(25,720)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 890.

MARY CAVANAUGH AND JAMES CAVANAUGH, APPELLANTS,

vs.

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, & THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF TEXAS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print
Caption	1	1
Original bill	2	1
Restraining order	12	8
Order setting application for interlocutory injunction down for hearing	13	8
Writ to serve copy of order on the governor of the State of Texas	14	9
Defendants' motion to strike out certain parts of complainants' bill	15	10
Defendants' answer	18	12
Decree	24	16
Statement of the evidence on appeal and order thereon	26	17
Assignment of errors	28	18
Petition for appeal and allowance thereof	33	21
Appeal bond	34	22
Waiver of issuance of citation, &c.	37	24
Agreement as to documents constituting record	38	24
Clerk's certificate	39	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 30, 1917.

1 *Caption.*

Be it remembered, That at Fort Worth, Texas, on November 29th A. D. 1916, before the Honorable R. W. Walker, United States Circuit Judge, and the Honorable Edward R. Meek and the Honorable Rufus E. Foster, United States District Judges, sitting as a special court convened for the purpose of hearing and determining an application filed by plaintiffs for an interlocutory injunction restraining the defendants, other than the Board of Regents of the State of Texas, in their respective official capacities from bringing threatened action to condemn certain real property belonging to plaintiffs under authority of a law of the State of Texas known as "S. B. No. 20, Chapter 6 of the General Laws of the State of Texas," the following proceedings were had and done, to-wit:

2805. Equity.

JAMES CAVANAUGH and MARY CAVANAUGH

versus

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS et al.

2 *Original Bill.*

Filed April 20, 1916.

To the Honorable Edward R. Meek, Judge of said Court:

Mary Cavanaugh and James Cavanaugh, both of whom are citizens of the State of Texas and domiciled at Austin, in Travis county, Texas, bring this their bill against Alexander Sanger, a citizen of the state of Texas and an inhabitant of the Northern District of Texas, who is domiciled at Dallas, in Dallas county, Texas; and against George S. McReynolds, a citizen of the state of Texas, who is domiciled at Temple, in Bell county, Texas; and against S. J. Jones, a citizen of the state of Texas, who is domiciled at Salado, in Bell county, Texas; and against M. Faber, a citizen of the state of Texas, who is domiciled at Tyler, in Smith county, Texas; and against George W. Littlefield, a citizen of the state of Texas, who is domiciled at Austin, in Travis county, Texas; and against F. W. Cook, a citizen of the state of Texas, who is domiciled at San Antonio, in Bexar county, Texas; and against A. W. Fly, a citizen of the state of Texas, who is doficiled at Galveston, in Galveston county, Texas; and against Will C. Hogg, a citizen of the state of Texas, who is doficiled at Houston, in Harris county, Texas; and against David Harrell, a citizen of the state of Texas, who is domiciled at Austin, in Travis county, Texas; and against the Board of Regents of the University of the state of Texas, an unincorporated association; and against

Ben F. Looney, a citizen of the state of Texas and an inhabitant of the Northern District of Texas, who is domiciled at Greenville, in Hunt county, and who can be found at Austin, in Travis county, Texas.

Mary Cavanaugh and James Cavanaugh, plaintiffs, respectfully show:

I.

That all of the said persons against whom this bill is brought, save Ben F. Looney, are members of the Board of Regents of the University of the State of Texas, and the said Ben F. Looney is
3 Attorney General of the State of Texas.

II.

That this suit is brought for the purpose of restraining the defendants, other than the unincorporated defendant Board of Regents of the University of the State of Texas, in their respective official capacities from enforcing against plaintiffs a certain purported law of the state of Texas known as "S. B. No. 20; Chapter 6, of the General Laws of the State of Texas," passed by the Thirty-second legislature at its first called sessions, which convened April *31st*, 1911, and adjourned August 29th 1911, on the ground that said law conflicts with the constitution of the United States, in that the defendants are thereby pretendedly authorized to take plaintiffs' property without due process of law, and plaintiffs are thereby deprived of the equal protection of the laws.

III.

That the said law is a local or special law, and is in words and figures as follows, to-wit:

"An Act to authorize and empower the Board of Regents of the University of Texas to acquire by purchase or condemnation for the use and benefit of the University of Texas such lands within the counties of Travis and Galveston as they may deem expedient for sites on which to erect and maintain buildings and for the extension of the campus and other purposes in the conduct of the said University, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Power and authority is hereby conferred upon the Board of Regents of the University of Texas to acquire by purchase or condemnation for the use and benefit of the University of Texas such lands within the counties of Travis and Galveston as they may deem expedient for sites on which to erect buildings for the
4 use of the said University and for the extension of the campus and for other purposes necessary in the conduct of the said University.

Sec. 2. If the said Board of Regents, in seeking to acquire any lands for any of the purposes aforesaid and the owner or owners of said land cannot agree for the sale and purchase thereof, the Board of Regents shall request the Attorney General to file a petition in the district court of the county in which the land sought to be condemned is situated, describing the land and stating the purposes for which it is desired by the Board of Regents, and praying that the value of such land be ascertained judiciously and a decree be entered vesting title thereto in the State of Texas for the use and benefit of the University of Texas upon the payment of the value so ascertained.

Sec. 3. Upon the filing of any such petition by the Attorney General, the clerk of the court shall issue a citation to the owner or owners of the land as in other civil cases, which citation shall be served and returned as in civil cases, and the cause shall be entered on the civil docket in the name of the Board of Regents of the University of Texas as plaintiff and the owner or owners of the land as defendant.

Sec. 4. At the first term of the court after service of citation upon the owner, as provided in the preceding section, the cause, unless continued on motion thereof, shall be tried by a jury upon a single issue as to the value of the land, and the decision of any such jury shall in all cases be final; provided the parties to said proceeding shall have the right of appeal as in other civil cases.

Sec. 5. Nothing in the preceding section contained shall be construed to prevent the parties from waiving a jury and submitting to the court the issue as to the value of the land in question, or from selecting by agreement three persons to ascertain the value of such land, under their oaths and the direction of the court; and the finding and decision of the court or of such persons shall in all cases be final; provided the parties to said proceeding shall have the right of appeal as in civil cases.

Sec. 6. When the value of the land has been ascertained in either of the modes above prescribed, and the court is satisfied with such valuation, it shall enter a decree vesting the title in such lands in the State of Texas for the use and benefit of the University of Texas, to be held, owned, possessed and enjoyed by the State of Texas for the purposes hereinbefore recited. No such decree shall be entered until the value of the land so ascertained, together with all reasonable costs and expenses of the owner in attending such proceeding, shall be paid to him, or into court for his benefit and subject to his order, such costs and expenses to be assessed by the court for which any such proceeding is had, including reasonable attorney's fees to be fixed by the court.

Sec. 7. The fact that there is no adequate law authorizing the Board of Regents to acquire such land as may be needed for the purposes aforesaid, creates an emergency and an imperative public necessity that the rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved August 30, 1911.

Becomes a law ninety days after adjournment."

IV.

That the Constitution of the State of Texas in force in 1911, and still in force, in Section 56, Article 3 thereof, provides as follows:

"The legislature shall not, except as otherwise provided in this constitution, pass any local or special law authorizing: * * *

6 regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioner, arbitrators or other tribunals, or providing or changing methods for the collection of debts or the enforcing of judgments, or prescribing the effect of judicial sales of real estate * * *" (Constitution of the State of Texas, adopted in 1876; Sec. 56).

V.

That said constitution, by Section 57, Article 3 thereof, provides as follows:

"No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least 30 days prior to the introduction into the legislature of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the legislature before such Act shall be passed."

VI.

That no notice of the intention to apply for said purported law was ever published either in Galveston county or in Travis county, where the matters or things to be affected were situated, which stated the substance of the contemplated law, nor was any evidence of such notice having been published exhibited in the legislature before the said purported Act was passed.

VII.

That, save and except as provided for in said purported Act, there is no constitutional or statutory provision of the State of Texas regulating the practice or jurisdiction of the district court of any county in the state in aid of the exercise of the right of eminent domain; nor, save and except as provided in said purported Act, has the dis-

7 trict court of any county in the state of Texas jurisdiction in any proceeding for the exercise of the right of eminent domain, all of which proceedings under the constitution and laws of the State of Texas, save as provided in said pretended Act, are under the jurisdiction of the county courts of said state and plaintiffs represent that, because said purported Act is, in its nature, a local and special law and because no notice thereof was published, as required by the constitution of the State of Texas, the said purported Act fails in affording to plaintiff due process of law, in that it provides for no appropriate nor properly constituted tribunal to inquire into and determine the value of the property to be taken thereunder.

VIII.

That neither under and by virtue of said purported Act nor otherwise has the legislature declared that any specific property is reasonably necessary for the purpose mentioned in said Act, nor the quantity thereof which is necessary, but has delegated the determination of these questions to the Board of Regents of the University of Texas, whereby, because of said delegation, the necessity for the taking of specific property and the quantity thereof which is necessary to be taken became a judicial question, and the power to take property under such delegation only can be exercised when and to the extent actually found reasonably necessary for the purposes of the University. Yet, by said purported Act these judicial questions are forbidden to be inquired into by the tribunal in which the petition for condemnation is to be filed, and the only issue, either of law or of fact, which may be determined in said proceeding, is the value of the property taken.

IX.

That the Constitution of the State of Texas, aforesaid, in Section 17, Article One thereof, provides:

"No person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation being made, unless by the consent of such person; and when taken, except
8 for the use of the state, such compensation shall be first made or secured by a deposit of money; and no irrepealable or uncontrollable grant of special privileges or immunities shall be made; and all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."

X.

That by said purported law the tribunal in which the condemnation proceeding therein provided for shall be instituted, is forbidden to inquire into the amount of damage to property not taken which will accrue from the taking of a part thereof, thereby depriving the owner, without due process of law, of the damages to the property not taken by the taking of a part thereof, to which he is entitled under the Constitution of the State of Texas as a vested property right.

XI.

That under and by virtue of said purported Act, authority is attempted to be given to the Regents of the University to acquire the fee simple title to property in such manner and form as that, after so acquiring the property, the said Board of Regents may resell the same or any part thereof not needed, or when not needed for the use of the University, so that the use thereof, when not so needed, would pass to the purchaser and not revert to the owners thereof at the time of condemnation or their heirs or vendees. Whereby the operation of such statute is to deprive the owners of property subject to its operation of their property against their will, not for a public use but for a private use, in violation of their rights guaranteed to them under the Fourteenth Amendment to the Constitution of the United States.

XII.

That the plaintiffs herein are the owners in fee simple of to-wit: 26 acres of land in the city of Austin, Travis county, Texas, lving on the west side of Waller creek, which is its east boundary; 9 and north of Nineteenth street, by which it is bounded on the south; and east of Lampasas street, by which it is bounded on the west and south of the L. Robinson tract, by which it is bounded on the north; said property being known as "Out Lots 0—1 and 2," which property is of the reasonable value of not less than Seventy Five Thousand ($75,000) Dollars, and which is the residence homestead of the plaintiffs and on which the plaintiff Mary Cavanaugh was born, 70 years ago, and which has been her home continuously since that time and has been the home of the plaintiff James Cavanaugh since his intermarriage with Mary Cavanaugh, many years ago.

XIII.

That the said property is so situated by occasion of its location and improvement, that the taking of a portion thereof would necessarily cause serious damage to the balance of the tract, and no benefits would accrue to such property by reason of the taking of a part thereof for University purposes.

XIV.

That the defendants, Littlefield and Harrell, acting for the said Board of Regents, of which they are members, have attempted to buy a portion or the whole of said property from the plaintiffs, who have been unwilling to sell the same at the prices suggested by them and are unwilling to sell the same or any part thereof on the valuation or any valuation that the said Board of Regents will agree to.

XV.

That the said Littlefield and Harrell have threatened plaintiffs with the condemnation of said property by the Board of Regents acting under said purported law, and that the said Board of Regents have arranged amongst themselves to have a meeting of that body on the 25th day of April 1916, for the purpose, among other things, of acting under said purported law in requesting the said Ben F. Looney, Attorney General, to file a petition in the district 10 court of Travis county, in which county said land is situated as aforesaid, with a view to having the same condemned under and by virtue of said purported Act. And your orators aver that, unless restrained by a writ from this Honorable Court, the said defendants constituting the Board of Regents of the University of Texas will, at their next meeting aforesaid, request the Attorney General to file a petition in the district court of Travis county for the condemnation of their property or a part thereof under said pretended Act, and that the said Attorney General, unless so restrained, will comply with said request of the Board of Regents, acting under said purported Act, and that the filing of such petition will cause

irreparable loss and damage to your petitioners by impounding their property in court pending the disposition of said proceeding and will cloud the title thereto and prevent the vending of same or any part thereof.

XVI.

That the matter and amount in dispute in this suit, exclusive of interest and cost, exceeds the sum or value of Three Thousand ($3,000) Dollars.

XVII.

That James E. Ferguson is the governor of the state of Texas, and he resides at Austin, in the Western District of Texas.

XVIII.

Wherefore, premises considered, plaintiffs pray that a restraining order issue herein, restraining the Board of Regents of the University of Texas, and each individual member thereof, the defendants herein, from requesting, by resolution or otherwise, the Attorney General to file a petition in the district court of Travis county for the condemnation of the whole or any part of the lands of plaintiffs herein mentioned, under and by virtue of said purported Act, and from doing any other act to initiate or prosecute any proceeding for the condemnation of said land or any part thereof under said Act; and restraining the said Ben F. Looney, Attorney General, from filing such petition at the request of his co-defendants herein, or
11 any of them, under said Act for the condemnation of said property or any part thereof; and that the said James E. Ferguson, Governor as aforesaid, and all of the defendants be cited to show cause why an interlocutory injunction should not issue against them and each of them in terms of the restraining order; and that said interlocutory injunction be issued and served and that the defendants, and each of them, be duly served with a subpœna in term of the law, and that on final hearing the plaintiffs have a decree perpetuating the interlocutory injunction aforesaid, and for costs and for such other and further relief as they may be entitled to according to the principles of equity, and as in duty bound they will ever pray.

MARY CAVANAUGH,
JAMES CAVANAUGH,
Plaintiffs,
By ETHERIDGE, McCORMICK & BROMBERG,
Their Solicitors.

STATE OF TEXAS,
County of Dallas:

Before me the undersigned authority on this day personally appeared J. M. McCormick, who being sworn, says on oath: that he is

one of the attorneys for and is agent for the plaintiffs, Mary Cavanaugh and James Cavanaugh, who reside at Austin, Texas, and who cannot personally make this affidavit on account of the length of time required for sending the bill to them and its return for presentation in time to secure the restraining order before the exigency therefor will have passed; that he is cognizant of the facts set forth in the foregoing bill and that the same are true as therein stated. And further affiant sayeth not.

J. M. McCORMICK.

Subscribed and sworn to by the said J. M. McCormick before me on this the 20 day of April 1916.

[SEAL.] F. H. GARROTT,
Notary Public in and for Dallas County, Texas.

12 *Restraining Order.*

Filed and Issued April 20, 1916.

The foregoing bill coming on to be heard on this the 20th day of April A. D. 1916, and the court being of the opinion that irreparable loss or damage would result to the plaintiffs unless a temporary restraining order is granted:

It is hereby ordered that upon the plaintiffs' entering into a bond in the sum of Five thousand ($5,000) Dollars, with a surety to be approved by the clerk, the clerk of this court will issue the restraining order against the defendants in terms as prayed for in the bill. Which said restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction, upon notice to the governor and the defendants, after a suitable court can be assembled, and the date for the hearing of said application for an interlocutory injunction set.

Given at Chambers at Dallas.

E. R. MEEK,
United States District Judge.

13 *Order Setting Down for Hearing Plaintiffs' Application for an Interlocutory Injunction.*

Filed and Entered November 10, 1916.

The bill of complaint in the foregoing cause having been heretofore presented to me, Edward R. Meek, United States District Judge for the Northern District of Texas, and a restraining order having been entered thereon, and it appearing therefrom that the said bill seeks an interlocutory injunction restraining the action of certain officers of the State of Texas in the enforcement or execution of a certain statute of the State of Texas, I have this day called to my assistance to hear and determine the application for such interlocutory injunction, the Honorable R. W. Walker, United States Circuit

Judge for the Fifth Circuit and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, and they have consented to serve in that capacity.

And it is thereupon ordered that the said application for an interlocutory injunction prayed for in the bill of complaint in this cause be set down for hearing before three judges named above in the United States District Court room at Fort Worth, Texas, on the 18th day of November 1916, at 10 o'clock A. M., or such time thereafter as it may be heard, and that notice of such hearing be given to each of the defendants in this cause and to his Excellency, James E. Ferguson, Governor of the State of Texas, by delivery to them and each of them of a certified copy of this order in conformity with the provisions of Section 266 of the Judicial Code of the United States.

In Chambers at Fort Worth, Texas, this November 10th, 1916.

EDWARD R. MEEK,
United States District Judge.

14 *Writ to Serve Copy of Order on James E. Ferguson, Governor of the State of Texas and Marshal's Return Thereon.*

Issued November 10, 1916.

The President of the United States of America to the Marshal of the United States for the Western District of Texas, Greeting:

You are hereby commanded to serve James E. Ferguson, Governor of the State of Texas, with the accompanying certified copy of order setting down for hearing plaintiffs' application for interlocutory injunction filed by James Cavanaugh and Mary Cavanaugh in cause No. 2805 Equity, and styled, James Cavanaugh and Mary Cavanaugh vs. Board of Regents of the University of Texas, et al.

Herein Fail Not, and due return of this writ make.

Witness, the Honorable Edward R. Meek, Judge of the District Court of the United States for the Northern District of Texas and the seal of the Dist. Court of the United States for the Northern District of Texas, at Dallas, this 10th day of November A. D. 1916.

[SEAL.] LOUIS C. MAYNARD,
Clerk of said Court,
By GEO. W. MITCHELL, *Deputy.*

Marshal's Return.

Received this writ on the 11th day of November 1916, and I executed the same on the 13th day of November 1916, by delivering to James E. Ferguson, Governor of the State of Texas, in person at Austin, Texas, in my District, the accompanying copy of order setting down for hearing plaintiffs' application for interlocutory injunction named in this writ, certified by the clerk of this court.

J. H. ROGERS,
U. S. Marshal, W. D. T.,
By T. H. THOMPSON, *Deputy.*

Fee $2.00.

15 *Defendants' Motion to Strike Out Certain Parts of Complainants' Bill.*

Filed November 18, 1916.

Now in this cause come all the defendants and move the court to strike from complainants' bill matters and paragraphs thereof hereinafter mentioned and for the reasons hereinafter assigned, and as to those matters so stricken out to dismiss the bill, to-wit:

1.

Defendants move the court to strike out paragraphs 4, 5, 6 and 7 of complainants' bill and to dismiss said portion of said bill for the following reason: These paragraphs of complainants' bill are based upon the legal proposition that Chapter 6, General Laws passed at the first called session of the 32nd Legislature is a local or special law, and the pleading in the paragraphs referred to for those portions of the bill plead the Constitution of this State with reference to the passage of local or special laws. Said Act of the Legislature being a general law of this State, the constitutional provisions referred to have no reference to it and the pleading referred to neither states nor tends to state any cause of action, and it should therefore be stricken from complainants' bill.

2.

The defendants move the court to strike from complainants' bill paragraph VIII for the reason that Chapter 6, General Laws passed at the first called session of the 32nd Legislature is not void and unconstitutonal for failing to specify what property is reasonably necessary for the purposes mentioned in the Act nor the quantity thereof, and for the reason that the Legislature had the authority under the Constitution to delegate the determination of these questions to the Board of Regents of the University of Texas, because the
16 Legislature had the authority to delegate to the Board of Regents of the University the power of determining the necessity for taking any specific property, and the quantity thereof, and such Act on the part of the Legislature was not the delegation of judicial power and the questions to be determined were not judicial questions, but are legislative questions, the determination of which was appropriately and lawfully delegated to the Board of Regents in the manner shown in the statutes. For these reasons, paragraph VIII of the complainants' bill neither states nor tends to state any cause of action, and should be stricken from the bill, and as to said paragraph the bill is dismissed.

3.

The defendants move the court to strike from complainants' bill paragraph XI, and to dismiss so much of said bill as is contained

in said paragraph XI, for the reason that the Legislature has a right, under the Constitution of this State and of the United States, to give the Board of Regents of the University authority to acquire fee simple title to property for the use of the University of Texas, and to thereafter, if the State should cease to desire the property for that or for some other use, to sell the same for another and different use; defendants say that the operation of such a statute does not deprive the plaintiffs of their property for private use or in violation of any rights guaranteed to them under the Constitution of this State or under the 14th Amendment to the Constitution of the United States.

4.

The defendants move the court to strike from paragraph XII of complainants' bill that portion of the same which declares with reference to the lands therein described, that the same "is the resi-
dent homestead of the plaintiffs and on which the plaintiff
17 Mary Cavanaugh was born seventy years ago and which has been her home continuously since that time, and has been the home of the plaintiff James Cavanaugh since his intermarriage with Mary Cavanaugh many years ago;" defendants say that this pleading is entirely irrelevant and immaterial to any issue in the case, is surplusage and prejudicial to a correct determination of the questions before the court.

5.

The defendants pray that on the hearing of this motion that those portions of complainants' bill specified above be stricken from the bill, and as to said portions so stricken from the bill that the bill of complaint be dismisses, and for such other and further relief as may be meet and proper in the premises.

B. F. LOONEY,
Attorney General.
BATTS & BROOKS,
Attorneys;
C. M. CURETON,
Assistant Att'y General;
Solicitors for Defendants.

18 *Answer of Defendants.*

Filed November 18, 1916.

The Answer of the Board of Regents of the University of Texas, Alexander Sanger, Geo. S. McReynolds, S. J. Jones, M. Faber, Geo. W. Littlefield, F. W. Cook, A. W. Fly, Will C. Hogg, and David Harrell, Members of the Board of Regents of the University of Texas, and of B. F. Looney, Attorney General of the State of Texas, the Above Named Defendants to the Bill of Complaint Exhibited against Them by Mary Cavanaugh and James Cavanaugh, the Above Named Complainants.

These defendants now, and at all times hereafter, saving and reserving to themselves any and all manner of benefits and advantages of any motion which they may have or may hereafter file herein relative to the right of the complainants to maintain this suit, or to have a hearing thereon at this time and relative to the imperfections and insufficiencies in complainants' said bill of complaint contained, for answer thereunto, or unto so much or such part thereof as these defendants are advised that it is material or necessary for them to answer unto, answering say:

1.

The plaintiffs cannot maintain this action against these defendants or either or any of them, for the reason that the suit is, in effect, one against the State of Texas, without its consent, in violation of the Eleventh Amendment to the Constitution of the United States; that the suit is brought against these defendants as the Board of Regents of the University of Texas, as members of the Board of Regents of the University of Texas and against the Attorney General of the State to restrain them in the performance of their official duties under valid and constitutional laws of the State, and as such, is, in effect, a suit against the State of Texas inhibited by the Constitution of the United States and inhibited by the fundamental law of sovereignty, and cannot be maintained with the State's consent, which has not been granted. Defendants pray that the action for this reason should be dismissed.

19

2.

The defendants admit that the facts stated in paragraph I of complainants' bill are true.

3.

As to the statement as to the purpose of this suit, contained in paragraph II of complainants' bill, these defendants are without knowledge except as contained and shown in the bill itself.

COPY BOUND C

4.

Paragraph III of complainants' bill contains a true and correct copy of Chapter 6, General Laws passed by the first called session of the 32nd Legislature, but defendants, of course, deny that it is either a local or a special law.

5.

Paragraph IV contains, correctly copied, an excerpt from Section 56, Article 3 of the Constitution of the State of Texas.

6.

Paragraph V contains a correct copy of Section 57, Article 3 of the Constitution of the State of Texas.

7.

Defendants admit that it is true, as stated in paragraph VI of complainants' bill, that no notice of the intention to apply for the passage of the law referred to was published, nor was any evidence of any publication ever exhibited to the Legislature, but defendants say that this court is without authority to make inquiry as to whether or not any publication was ever made or any evidence thereof ever offered the Legislature, even though the court should be of the opinion that the law made the basis of this suit was a local or a special law, which is controverted and denied by these defendants.

8.

As to the conclusions of law stated in paragraph VII of complainants' bill, to the effect that the statutes of this state regulating the practice or jurisdictions of courts relative to the exercise of the power of eminent domain is confined to the county courts, except as to the present act under consideration, these defendants make no denial, but state that they have no information concerning the matter except that contained in the constitution and laws of the State, but these defendants, of course, controvert and deny the conclusion of law in this paragraph, to the effect that the act of the Legislature made a basis of this suit is in its nature a local or special law, and controvert and deny the conclusion *of* that the act fails in providing an appropriate or properly constituted tribunal to inquire into and determine the value of the property taken thereunder.

9.

Section 17, Article 1 of the Constitution of the State of Texas is correctly copied in Paragraph IX of complainants' bill.

CLOSE IN CENTER

10.

Defendants say that it is true that plaintiffs are owners in fee simple of twenty-six acres of land in the city of Austin, Travis county, Texas, lying on the west side of Waller Creek, which is the east boundary and north of 19th Street, by which it is bounded on the south, and east of Lampasas Street, by which it is bounded on the west and south of the L. Robinson tract, by which it is bounded on the north; said property being known as Outlots 0, 1 and 2; but defendants deny that said property is of the value of $75,000.00.

11.

The defendants deny the allegations made in paragraph
21 XIII of complainants' bill, to the effect that said property is so situated by occasion of its location and improvement that the taking of a portion thereof would necessarily cause serious damage to the balance of the tract and that no benefit would accrue to said property by reason of the taking of said part thereof for purposes of the University; on the other hand, the defendants allege that such property is within the corporate limits of the City of Austin and is practically surrounded on three sides by residences, and its principal value lies in its use for building purposes; that the taking of any part of same for University purposes would not destroy the value or utility of the remainder for the purposes for which it is best fitted, but would be well calculated to and would enhance the value of the same.

12.

The defendants admit that the defendants Littlefield and Harrell, acting for the Board of Regents of the University of Texas, of which they are members, have attempted to buy a portion and have attempted to buy the whole, of said property of the plaintiffs; but plaintiffs have been unwilling to sell the same at the prices which the Board of Regents were willing to pay and as these defendants believe the property to be worth; and that plaintiffs have been unwilling to sell such lands, or any part thereof, on the valuation, or at any valuation, that the Board of Regents of the University of Texas will agree to.

13.

Defendants say that it is true that the Board of Regents of the University of Texas, acting under the law referred to in complainants' bill, intend to and will, unless restrained by this court, take all necessary legal action to condemn the plaintiffs' land referred to in complainants' bill, and that among other things said Board of Regents will request the defendant B. F. Looney, Attorney General
of the State of Texas, to file a petition in the District Court
22 of Travis county, in which said land is situated with a view to having the whole of said land condemned under and by

COPY BOUND

virtue of the provisions of Chapter 6, General Laws passed at the first called session of the 32nd Legislature; that the defendant B. F. Looney, Attorney General of the State of Texas, will comply with the request of said Board of Regents acting under said Act of the Legislature, and will, unless restrained by this court, carry into effect all the provisions of said Act of the Legislature, in so far as it is necessary to condemn the aforesaid land of the plaintiffs.

14.

The facts stated in paragraph XVI of complainants' bill are true.

15.

Wherefore, the defendants pray, first, that the bill filed herein by the plaintiffs be dismissed for want of equity; second, that the same be dismissed because the suit is brought in violation of the Eleventh Amendment to the Constitution of the United States, for that it is a suit against the State of Texas, brought without the State's consent; and, third, or if this bill be not dismissed, then that the plaintiffs take nothing by this record, and that no injunction, either interlocutory or permanent, be issued against the defendants or any one, or either of them, and that these defendants each recover of the plaintiffs the cost respectively by them incurred, and for such other and further relief as they may be jointly and severally entitled to in the premises.

BOARD OF REGENTS OF THE UNIVERSITY,
By GEO. W. LITTLEFIELD,
ALEXANDER SANGER,
GEO. S. McREYNOLDS,
S. J. JONES,
M. FABER,
F. W. COOK,
A. W. FLY,
WILL C. HOGG,
DAVID HARRELL,
Defendants.

By—
B. F. LOONEY,
Attorney General;
BATTS & BROOKS,
Attorneys;
23 C. M. CURETON,
Assistant Attorney General,
Solicitors for the Defendants.

THE STATE OF TEXAS,
County of Travis:

Before me, the undersigned authority on this day personally appeared B. F. Looney, Attorney General of the State of Texas,

D CLOSE IN CENTER

who being by me duly sworn on oath deposes and says that he is the Attorney General of the State of Texas and one of the defendants in the above answer and he is solicitor for all of his co-defendants; that he is cognizant of the facts set forth in said answer and that the same are true in substance and in fact from information derived from Geo. W. Littlefield, a member of the Board of University Regents, and further affiant sayeth not.

B. F. LOONEY.

Subscribed and sworn to by B. F. Looney before me on this the 17 day of Nov. A. D. 1916.

Witness my hand and seal of office on the date last above written.

[SEAL.] M. S. DUMAS,
Notary Public, Travis County, Texas.

24 *Decree.*

Filed and Entered November 29, 1916.

The application of Mary and James Cavanaugh for an interlocutory injunction against the defendants Alexander Sanger, J. S. McReynolds, S. J. Jones, M. Faber, George Y. Littlefield, F. W. Cook, A. W. Fly, Will C. Hogg, David Harrell, each and all being citizens of the State of Texas, and against the Board of Regents of the State of Texas, an unincorporated association, and against Ben F. Looney, a citizen of the State of Texas and an inhabitant of the Northern District of Texas, coming on to be heard before the Honorable R. W. Walker, United States Circuit Judge and Honorable E. R. Meek and Honorable R. E. Foster, United States District Judges, sitting as a special court convened for the purpose of hearing and determining said application for an interlocutory injunction, said injunction being sought for the purpose of restraining the defendants, other than the unincorporated defendant Board of Regents of the University of the State of Texas, in their respective official capacities from bringing threatened action to condemn certain real property belonging to plaintiffs under the authority of a law of the State of Texas known as "S. B. No. 20, Chapter 6 of the General Laws of the State of Texas" passed by the thirty-second Legislature at its first called session which convened April *31*, 1911, and adjourned August 29, 1911, on the alleged ground that said law conflicts with the Constitution of the United States in that it is therein and thereby undertaken to authorize the defendants to take the plaintiffs' property without due process of law and deprive plaintiffs of the equal protection of the laws; said application coming on to be heard on the original bill of the plaintiffs and the answer of the defendants and the argument of counsel having been heard and duly considered it is the opinion of the court that the plaintiffs are not entitled to the interlocutory injunction sought by them.

It appearing from the record that on the application of the plaintiffs a restraining order was heretofore entered against the defendants

COPY BOUND C

on the 20th day of April, 1916, in terms as prayed for in
25 plaintiffs' bill, it is therefore ordered and decreed that said restraining order be and the same is hereby dissolved.

It is further ordered that the preliminary injunction as sought by the prayer of the plaintiffs' bill be, and the same is hereby denied.

R. W. WALKER,
Circuit Judge.
EDWARD R. MEEK,
District Judge.
RUFUS E. FOSTER,
District Judge.

26 *Statement of the Evidence on Appeal.*

Filed December 7, 1916.

Be it remembered that on the 18th day of November, 1916, the above entitled case came on for hearing before Honorable Richard W. Walker, Circuit Judge, Honorable Rufus E. Foster, District Judge for the Eastern District of Louisiana, and Honorable Edward R. Meek, District Judge for the Northern District of Texas, the plaintiffs appeared by their solicitors, Etheridge, McCormick & Bromberg, and the defendants appeared by their solicitors, C. M. Cureton, Esquire, and R. L. Batts, Esquire, and the following proceedings were had and done, to-wit:

Counsel agreed in open court as follows: That on the hearing of the application for an interlocutory injunction the matters of fact set forth in the plaintiffs' bill would be regarded as admitted by the defendants except as to two matters of fact; first, the value of the property; and second, the intention of the defendants to take, through the exercise of the right of eminent domain, less than the whole of plaintiffs' property described in the bill; and that as touching the first matter the court would regard the defendants as having offered testimony that the value of the land is and was as alleged in defendants' answer; and as touching the second matter the court would regard the defendants as having offered proof that the defendant did not, at any time prior to the filing of the bill, intend, nor had they since intended to take a part only of plaintiffs' land, but that at and prior to the filing of the bill, and since the filing of the bill down to the time of the hearing, the intention of the defendants has been to take and appropriate the whole of plaintiffs' land described in their bill.

The foregoing statement is agreed to as a correct statement under
27 paragraph (*b*) of Equity Rule 75, and lodgment thereof in the clerk's office for the examination of the defendants, and notice of such lodgment and of the time when the same will

CLOSE IN CENTER

be presented to the Judge for approval, are hereby waived and the same may be approved by the Judge at once.

B. F. LOONEY,
Attorney General;
BATTS & BROOKS, *Attorneys;*
C. M. CURETON,
Assistant Attorney General,
Solicitors for the Defendants.
ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for the Plaintiffs.

On this the 6th day of December, A. D. 1916, the foregoing statement having been presented to me, the same is hereby in all things allowed and approved, and the same is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the above styled and numbered cause, as provided in paragraph (*b*) of the 57th Equity Rule.

E. R. MEEK,
United States District Judge.

28 *Assignment of Errors.*

Filed December 7, 1916.

And now, at the time of filing their petition for appeal and the allowance thereof, come Mary Cavanaugh and James Cavanaugh, plaintiffs and appellants, and make and file their assignment of errors as follows:

1.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, Chapter 6, of the General Laws of the State of Texas, passed by the 32d Legislature at its first called session in 1911, denied to the plaintiffs the due process of law guaranteed to them by the first section of the 14th Amendment to the Constitution of the United States, because the said act was passed in violation of Section 56, of Article 3, of the Constitution of the State of Texas, which forbids the passage by the Texas Legislature of a local or special law, such as this Act is, which regulates the practice in a judicial proceeding before a court, which this Act does, and said Act being void when viewed in the light of the constitutional provision of the State of Texas referred to, erected no tribunal competent to award the plaintiffs adequate and just compensation for their land sought to be taken under the exercise of the right of eminent domain.

2.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legisla-

COPY BOUND C

tion challenged in the bill and known as S. B. 20, Chapter 6, of the General Laws of the State of Texas, passed by the 32d Legislature at its first called session in 1911, denied to the plaintiffs the due process of law guaranteed to them by the first section of the 14th Amendment to the Constitution of the United States, because the said Act was passed in violation of Section 56, of Article 3, of the Constitution of the State of Texas, which forbids the passage by the Texas Legislature of a local or special law, such as this Act is, which regulates the jurisdiction of a court or tribunal, which this Act does, and said Act being void when viewed in the light of the constitutional provision of the state of Texas referred to, erected no tribunal competent to award the plaintiffs adequate and just compensation for their land sought to be taken under the exercise of the right of eminent domain.

3.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, Chapter 6, of the General Laws of the State of Texas, passed by the 32d Legislature at its first called session in 1911, denied to the plaintiffs the due process of law guaranteed to them by the first section of the 14th Amendment to the Constitution of the United States, because the said Act was passed in violation of Section 57, of Article 3, of the Constitution of the State of Texas, which forbids the Legislature of the State of Texas to pass a local or special law, such as the Act in question is, without publication of notice of the intention to apply therefor prior to the introduction of the same into the Legislature, and the legislation challenged was passed without such notice, and said Act being void when viewed in the light of the constitutional provision of the State of Texas referred to, erected no tribunal competent to award plaintiffs adequate and just compensation for their land sought to be taken under the exercise of the right of eminent domain.

4.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, Chapter 6, of the General Laws of the State of Texas, passed by the 32d Legislature at its first called session in 1911, denied to the plaintiffs the due process of law guaranteed to them by the first section of the 14th Amendment to the Constitution of the United States, because the said Act was passed in violation of Section 17, of Article 1, of the Constitution of the State of Texas, which provides in substances that private property may not be damaged for public use without adequate compensation to the owner of the land damaged by the appropriation, and by the legislation challenged the tribunal thereby attempted to be erected is precluded

CLOSE IN CENTER

from awarding damages to the land not taken where less than the whole of the property is taken, but there is no other tribunal, under the jurisprudence of the State of Texas which could make and enforce such an award, and said Act being void when viewed in the light of the constitutional provision of the State of Texas referred to, erected no tribunal competent to award plaintiffs adequate and just compensation for their land sought to be taken under the exercise of the right of eminent domain where less than the whole of the tract is taken.

5.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, Chapter 6, of the General Laws of the State of Texas, passed by the 32d Legislature at its first called session in 1911, denied to the plaintiffs the due process of law guaranteed to them by the first section of the 14th Amendment to the Constitution of the United States, because the tribunal attempted to be erected by said Act has no power thereunder to pass on the judicial questions arising in condemnation proceedings, whereas a tribunal possessing such power is a component element in due process of law.

31

6.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, Chapter 6, of the General Laws of the State of Texas, passed by the 32d Legislature at its first called session in 1911, denied to the plaintiffs the due process of law guaranteed to them by the first section of the 14th Amendment to the Constitution of the United States, because the Act challenged provides a rule for determining compensation and restricts the tribunal from awarding just and adequate compensation in the event the Regents of the University elect to take less than the whole of the plaintiffs' property described in the bill, because the Act challenged makes no provision for, and in fact prohibits the consideration by the tribunal attempted to be erected of the judicial question as to whether the use for which the property is to be subjected is a public use.

7.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, Chapter 6, of the General Laws of the State of Texas, passed by the 32d Legislature at its first called session in 1911, denied to the plaintiffs the due process of law guaranteed to them by the first section of the 14th Amendment to the Constitution of the United States, because the Act challenged makes no provision for, and in fact forbids the tribunal at-

COPY BOUND CL

tempted to be erected to determine the quantity or extent of property which may be subjected to the public use.

8.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them, because in view of the provisions of the sixth section of the Act challenged which
32 provides that upon the rendition of judgment by the trial court and deposit of money in the court, possession may be taken pending an appeal, the legal remedies open to the plaintiffs are not as complete and adequate as the preventative remedy through the equitable writ of injunction.

9.

The court and judges erred in refusing to grant to the plaintiffs the writ of injunction prayed by them in view of the sixth section of the Act challenged which provides that upon the rendition of judgment by the trial court and deposit of money in the court, possession may be taken pending an appeal, which leaves the enjoyment of plaintiffs' homestead subject to disturbance under the unconstitutional Act prior to final determination in the condemnation proceedings of the validity thereof, and renders legal remedies open to the plaintiffs less complete, adequate and convenient than the preventative relief afforded by a court of equity through the issuance of its writ of injunction.

For which errors found in the record, and because of each of them, the plaintiffs below, now appellants, pray for a reversal of the decree of the District Court of the United States for the Northern District of Texas entered in this cause refusing to grant to the plaintiffs, now appellants, an interlocutory injunction against the defendants, now appellees, as prayed for in their bill; that said decree refusing to grant the interlocutory injunction prayed for be reversed; and that the court and the Judge, or Judges thereof, be directed to grant the interlocutory injunction prayed in the bill, and the appellants pray for such other relief as they may be entitled to.

ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Mary and James Cavanaugh, Appellants, Plaintiffs Below.

33 *Petition for Appeal and Allowance Thereof.*

Filed and Entered December 7, 1916.

The above named plaintiffs, Mary Cavanaugh and James Cavanaugh, conceiving themselves aggrieved by the decree, order and judgment entered in the above entitled cause on November 29, 1916, hereby appeal from said decree, order and judgment to the Supreme

CLOSE IN CENTER

Court of the United States, and they pray that their appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

And now at the time of the filing of this petition for appeal the said Mary Cavanaugh and James Cavanaugh, appellants, file an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States.

Wherefore, the said Mary Cavanaugh and James Cavanaugh plaintiffs as aforesaid, and appellants, pray that their appeal be allowed.

ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Mary Cavanaugh and James Cavanaugh, Plaintiffs and Appellants.

And now, to-wit: on this the 6th day of December A. D. 1916, at Ft. Worth, it is ordered that the appeal prayed for in the foregoing petition be and the same is hereby allowed as therein prayed for.

E. R. MEEK,
United States District Judge.

34 *Bond on Appeal.*

Approved and Filed December 7, 1916.

Know all men by these presents: That we, Mary Cavanaugh and James Cavanaugh, as principals, and the other subscriber hereto, as surety, are held and firmly bound unto Ben F. Looney, Attorney General of the State of Texas, unto the Board of Regents of the University of the State of Texas, and unto Alexander Sanger, George S. McReynolds, S. J. Jones, M. Faber, George W. Littlefield, F. W. Cook, A. W. Fly, Will C. Hogg and David Harrell, sued herein as members of the Board of Regents of the University of the State of Texas, in the full and just sum of Five Hundred ($500) Dollars, to be paid to the said Ben F. Looney, Attorney General of the State of Texas, Board of Regents of the University of the State of Texas, and Alexander Sanger, George S. McReynolds, S. J. Jones, M. Faber, George W. Littlefield, F. W. Cook, A. W. Fly, Will C. Hogg and David Harrell, their successors or assigns, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4" day of December A. D. 1916.

Whereas, lately at Chambers, the United States District Court for the Northern District of Texas at Dallas, in a suit pending in said

court between Mary Cavanaugh and James Cavanaugh plaintiffs, and the Board of Regents of the University of the State of Texas, et al., defendants, numbered 2805, a decree was rendered against the said plaintiffs, Mary Cavanaugh and James Cavanaugh; and,

Whereas, the above named Mary Cavanaugh and James Cavanaugh have prosecuted an appeal to the Supreme Court of the United States to reverse said decree rendered in the above entitled suit denying them an interlocutory injunction as prayed in their bill;

35 Now, Therefore, the condition of this obligation is such that if the above named Mary Cavanaugh and James Cavanaugh shall prosecute said appeal to effect and answer all damages and costs if they fail to make such appeal good, then this obligation shall be void; otherwise same shall remain in full force and virtue.

MRS. MARY CAVANAUGH,
Principal.

JAMES CAVANAUGH,
Principal.

CHESTER THRASHER,
Surety.

Approved:
E. R. MEEK,
U. S. District Judge.

THE STATE OF TEXAS,
County of Travis:

Before me, R. E. Carrington, a Notary Public in and for Travis county, Texas, on this day personally appeared Chester Thrasher, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 4" day of December A. D. 1916.

[SEAL.]

R. E. CARRINGTON,
Notary Public in and for
Travis County, Texas.

THE STATE OF TEXAS,
County of Travis:

Before me, R. E. Carrington, a Notary Public in and for Travis county, Texas, on this day personally appeared James Cavanaugh and Mary Cavanaugh, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said Mary Cavanaugh, wife of the said James Cavanaugh, having been

36 examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Mary Cavanaugh, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the

purposes and consideration therein expressed and that she did not wish to retract it.

Given under my hand and seal of office, this 4th day of December 1916.

[SEAL.]

R. E. CARRINGTON,
Notary Public in and for
Travis County, Texas.

37 *Waiver of Issuance of Citation and Service Thereof on Appeal.*

Filed December 7, 1916.

Come now Ben F. Looney, Attorney General of the State of Texas, Board of Regents of the University of the State of Texas, and Alexander Sanger, George S. McReynolds, S. J. Jones, M. Faber, George W. Littlefield, F. W. Cook, A. W. Fly, Will C. Hogg and David Harrell, sued herein as members of the Board of Regents of the University of the State of Texas, by their solicitors herein, and waive the issuance of citation on appeal, and agree to appear and otherwise act herein as though citation had been issued and served upon them, respectively.

B. F. LOONEY,
Attorney General;
BATTS & BROOKS,
Attorneys;
C. M. CURETON,
Assistant Attorney General,
Solicitors for the Defendants.

38 *Agreement as to Document Which Shall Constitute the Record on Appeal.*

Filed December 7, 1916.

The parties hereto, waiving præcipe, have agreed that the following documents shall constitute the record on appeal:

1. Plaintiff's bill.
2. Order for hearing on application for interlocutory injunction.
3. Præcipe and return thereon showing service thereof on His Excellency, James E. Ferguson, Governor of the State of Texas.
4. Defendants' motion to strike.
5. Defendants' answer.
6. Decree of the court.
7. Statement of the evidence on appeal.
8. Assignments of errors by plaintiffs.
9. Petition for appeal and allowance thereof.
10. Appeal bond of plaintiffs.
11. Waiver of issuance of citation on appeal.

12. Agreement as to papers composing the record.
13. Cost bill.
14. Certificate of clerk.

B. F. LOONEY,
Attorney General;
BATTS & BROOKS,
Attorneys;
C. M. CURETON,
Ass't Attorney General,
Solicitors for the Defendants.

39 *Clerk's Certificate.*

I, Louis C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignment of errors and all proceedings had upon the application for an interlocutory injunction in cause No. 2805 in Equity, wherein Mary Cavanaugh and James Cavanaugh are plaintiffs and the Board of Regents of the University of the State of Texas et al. are defendants, as fully as the same now remain on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said District Court, at Dallas, Texas, this the 29th day of December A. D. 1916, and of American Independence the 141st year.

[The Seal of the U. S. District Court, Northern Dist. Texas, Dallas.]

LOUIS C. MAYNARD, *Clerk,*
By E. C. VAN DUSEN, *Deputy.*

Endorsed on cover: File No. 25,720. N. Texas D. C. U. S. Term No. 890. Mary Cavanaugh and James Cavanaugh, Appellants, vs. Ben F. Looney, Attorney General of the State of Texas, & The Board of Regents of the University of the State of Texas. Filed January 23d, 1917. File No. 25,720.

FILED
SEP 25 1918
JAMES D. MAHER,
CLERK

-15-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. [redacted]107

MARY CAVANAUGH AND JAMES CAVANAUGH, Appellants,

vs.

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF TEXAS,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS UNDER SECTION 129, JUDICIAL CODE.

BRIEF FOR THE APPELLANTS.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Appellants.

INDEX.

Page

Statement of the case 1-4

Statement of the errors relied upon 4-11

POINT 1:

The nature of the use for which private property is attempted to be taken by condemnation, whether public or private, is a judicial question 12

Argument under Point 1 12

POINT 2:

The measure of compensation for so much of appellants' land as may be taken is a judicial question 12

Argument under Point 2 12-17

POINT 3:

The legislature may determine the quantity of property to be taken for a public use and its location, but where it does neither and simply grants the power to take, then in the delegation of the power is implied the condition that it shall only be exercised to the extent, and where found reasonably necessary, which, in this circumstance, are judicial questions 17

Argument under Point 3 17-23

POINT 4:

Due process of law includes as an essential element that appellants' property can only be expropriated by a competent tribunal clothed with jurisdiction to hear and determine the judicial questions at issue 23

Argument under Point 4 23-34

Page

POINT 5:

The tribunal erected by the act relied on, being denied thereby power to award the adequate compensation provided by section 17, article 1 of the Texas constitution, or to decide the other judicial questions, because confined in its investigation to the single issue of the value of the land, is not in substance a properly constituted tribunal clothed with appropriate power, which is one of the essential elements of that due process of law guarantied by the first section of the fourteenth amendment of the constitution of the United States-- 34

Argument under Point 5---------- 34-36

POINT 6:

The constitutional protection afforded by the statute is not to be tested by an inquiry whether just and good men might under its terms award adequate compensation and otherwise fully protect the owner of the property, but the test is what may be done under it by unjust and bad men---------- 36

Argument under Point 6---------- 36-42

CASES AND AUTHORITIES CITED.

Adirondack Ry. Co. v. New York State, 176 U. S. 335---------- 21

Backus v. Fort Street Union Depot Co., 169 U. S. 568----------24, 28

Bauman v. Ross, 167 U. S. 548, 593----------24, 39

Bonaparte v. Camden, 3 Fed. Cas. No. 1617--- 29

INDEX—Continued.

	Page
Boom Co. v. Patterson, 98 U. S. 403	28
Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389	14
Black on Constitutional Law, (3rd Ed.) pp. 587, 588	27, 29
Brannon on Fourteenth Amendment, pp. 466 et seq.	26, 29
Charles v. City of Marion et al., 98 Fed. 168	25
Charles River Bridge v. Warren Bridge, 11 Pet. 420, 571	13
Cherokee Nation v. Kansas Ry., 135 U. S. 641	29
C. B. & Q. Ry. v. Chicago, 166 U. S. 226	29
City of Beatrice v. Wright, 77 Neb. 689, 101 N. W. 1039	36
City of Los Angeles v. Lewis, 167 Pac. 393	36
Commissioners of Johnson County v. Lacy, State Treasurer, 93 S. E. (L. C.) 485	37
Commonwealth v. Pittsburgh & Connellsville R. R., 58 Penn. St., 26, 50	13
Croley v. St. Louis Southwestern Ry. Co., 56 S. W. 615	22
Cooley's Constitutional Limitations, (6th Ed.) p. 644, et seq.	19, 29
15 Cyc. 632	19
Fordyce et al. v. Wolfe, 82 Tex. 239	34
Fourteenth Amendment to the Constitution of the United States, section 1	28

INDEX—Continued.

Page

Hairston v. Danville & Western Ry. Co., 208 U. S. 598 ---------- 12

Hamilton County v. Garrett, 62 Tex. 602----- 34

Highland Boy Gold Mining Co. v. Strickley, 116 Fed. 856---------- 17

Huntley v. Osborn, 188 S. W. 1115---------- 18

Isom v. Mississippi Central R. R., 36 Miss. 300 ----------13, 14, 17

Kramer v. Cleveland R. Co., 1 Ohio Dec. 474-- 17

Logan v. Stogdale, 24 N. E. 136---------- 12

Lewis on Eminent Domain, Vol. 1, p. 408, sec. 158 ----------12, 17

Lewis on Eminent Domain, (2nd. Ed.) secs. 562, 464 ---------- 17

Lewis' Sutherland Stat. Cons., sec. 107------- 36

Manderson, In re, 51 Fed. 501---------- 29

Martin v. District of Columbia, 205 U. S. 135-- 40

McCammon et al. v. Trinity & B. V. Ry., 133 S. W. 247 ---------- 34

McCoy v. Union Elevated R. R. Co., U. S. Sup. Ct. Adv. Opinions, July 1, 1918, p. 617--- 40

Minneapolis Brewing Co. v. McGillivary (C. C.) 104 Fed. 258---------- 36

Monongahela Navigation Co. v. United States, 148 U. S. 326----------12, 17

Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama I. P. Co., 240 U. S. 30--------- 12

INDEX—Continued.

Page

Newburyport Water Co. v. City of Newburyport, 85 Fed. 724 ..... 16, 17

New Central Coal Co. et al. v. George's Creek Coal Co. et al., 37 Md. 537 19

Oates v. State, 121 S. W. 376 ..... 27, 29

Penn. R. R. v. Baltimore & Ohio R. R., 60 Md. 263 13

Sadler v. Langham, 34 Ala. 311 12

S. A. & A. P. v. Ruby, 80 Tex. 172 34

Searl v. School District, 133 U. S. 562 ..... 23, 28

Sears v. Akron, U. S. Sup. Ct. Adv. Sheets, No. 9, p. 283, April 1, 1918 12

Shoemaker v. United States, 147 U. S. 282 ..... 12, 20

State v. O'Leary, 43 Mont. 157, 115 Pac. 204 36

State v. Stark County, 14 N. D. 368, 103 N. W. 913 36

Stewart v. Palmer, 74 N. Y. 183, 30 Amer. Rep. 289 36

St. L. A. & T. Ry. v. Henderson, 86 Tex. 239 34

Sweet v. Rechel, 159 U. S. 380 29

T. & P. Ry. Co. v. Edrington, 100 Tex. 496 34

Texas Western Ry. v. Cave, 80 Tex. 137 34

Texas Constitution, sec 17, art. 1 ..... 33, 34

United States v. Gettysburg Electric Ry. Co., 160 U. S. 668 ..... 12, 21

United States v. Jones, 109 U. S. 513 28

Woolridge v. Eastland County, 70 Tex. 680 34

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASE.

The appellants, husband and wife, are the owners of twenty-six acres in the city of Austin on which is located their residence homestead, where Mary Cavanaugh was born more than seventy-two years ago and where she has continuously since resided. Contiguous to this property is the site of the university of Texas controlled by a board of regents appointed by the governor from time to time as their places become vacant by death, resignation or expiration of the term.

A purported act of the legislature of Texas approved August 30, 1911, set forth in the record at pages 2 and 3, in substance provides:

(1) That the regents of the university of Texas shall have power to acquire by purchase or condemnation for the use and benefit of the university such lands in Travis and Galveston counties as they may deem expedient for the purposes of the university.

(2) That failing to agree with the owners on terms of sale, the board shall request the attorney general to file a petition in the district court of the

county in which the land sought to be condemned is situated, describing the land and praying that its value be ascertained and a decree entered vesting title in the state of Texas for the use of the university upon payment of the value so ascertained.

(3) That a citation shall issue to the owner returnable as in civil cases, and the case docketed in the name of the board of regents as plaintiff and the owner or owners as defendant.

(4) That after due service the case "**shall, unless continued, be tried by a jury upon a single issue as to the value of the land, and the decision of such jury shall in all cases be final; provided, the parties to said proceeding shall have the right of appeal as in other civil cases.**"

(5) That the parties may waive a jury and try the issue before the court or before three appraisers to be selected by them, who shall try the issue under oath and under the direction of the court, and that the finding and decision of the court or of the appraisers shall in all cases be final, subject to the right of appeal as in civil cases.

(6) That when the value of the land has been ascertained in either of the methods provided by the statute, the court shall enter a decree vesting the

title in the state of Texas for the use of the university after the value of the land and all costs and expenses of the owner shall be paid to him or into court for his benefit, the costs and expenses to be assessed by the court, including a reasonable attorney's fee to be fixed by the court.

(7) That there being no adequate law authorizing the acquisition of such lands an emergency exists and the act shall take effect from its passage.

The board of regents sought to acquire the twenty-six acres, or a part thereof, but the appellants were unwilling to sell any of the land; whereupon, the board threatening to act under said statute to acquire the land, or a part of it, appellants on April 20, 1916, filed their bill in the court below against the individuals composing the board of regents, the board itself, and the attorney general, challenging the constitutionality of the act because its provisions conflict with the 14th amendment of the constitution of the United States by denying to them due process of law and the equal protection of the law; and they prayed for a restraining order and an interlocutory injunction, and for other relief. The restraining order was granted, and, after due notice given and answer filed by the attorney general for himself, the board, and its members, a special court

consisting of circuit judge R. W. Walker, and district judges Edward R. Meek and Rufus E. Foster heard the motion for an interlocutory injunction. It was refused and the restraining order dissolved by a decree entered November 29, 1916. (R. 16-17). On December 7, 1916 appellants assigned errors on the denial of the interlocutory injunction (R. 18-21), filed them with a petition of appeal which was allowed (R. 21-22), and with their approved appeal bond (R. 22-23). On the same day the appellees filed a waiver of citation and the service thereof, (R. 24) and the parties filed a stipulation as to the contents of the record. (R. 24-25).

STATEMENT OF THE ERRORS RELIED UPON.

1.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, chapter 6, of the general laws of the state of Texas, passed by the 32d legislature at its first called session in 1911, denied to the plaintiffs the due process of law guarantied to them by the first section of the 14th amendment to the constitution of the United States, because the

said act was passed in violation of section 56, of article 3, of the constitution of the state of Texas, which forbids the passage by the Texas legislature of a local or special law, such as this act is, which regulates the practice in a judicial proceeding before a court, which this act does, and said act being void when viewed in the light of the constitutional provision of the state of Texas referred to, erected no tribunal competent to award the plaintiffs adequate and just compensation for their land sought to be taken under the exercise of the right of eminent domain.

2.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, chapter 6, of the general laws of the state of Texas, passed by the 32d legislature at its first called session in 1911, denied to the plaintiffs the due process of law guarantied to them by the first section of the 14th amendment to the constitution of the United States, because the said act was passed in violation of section 56, of article 3, of the constitution of the state of Texas, which forbids the passage by the Texas legislature of a local or special law, such as this act is, which

regulates the jurisdiction of a court or tribunal, which this act does, and said act being void when viewed in the light of the constitutional provision of the state of Texas referred to, erected no tribunal competent to award the plaintiffs adequate and just compensation for their land sought to be taken under the exercise of the right of eminent domain.

3.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, chapter 6, of the general laws of the state of Texas, passed by the 32d legislature at its first called session in 1911, denied to the plaintiffs the due process of law guarantied to them by the first section of the 14th amendment of the constitution of the United Staes, because the said act was passed in violation of section 57, of article 3, of the constitution of the state of Texas, which forbids the legislature of the state of Texas to pass a local or special law, such as the act in question is, without publication of notice of the intention to apply therefor prior to the introduction of the same into the legislature, and the legislation challenged was passed without such notice, and said

act being void when viewed in the light of the constitutional provision of the state of Texas referred to, erected no tribunal competent to award plaintiffs adequate and just compensation for their land sought to be taken under the exercise of the right of eminent domain.

4.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, chapter 6, of the general laws of the state of Texas, passed by the 32d legislature at its first called session in 1911, denied to the plaintiffs the due process of law guarantied to them by the first section of the 14th amendment to the constitution of the United States, because the said act was passed in violation of section 17, of article 1, of the constitution of the state of Texas, which provides in substance that private property may not be damaged for public use without adequate compensation to the owner of the land damaged by the appropriation, and by the legislation challenged the tribunal thereby attempted to be erected is precluded from awarding damages to the land not taken where less than the whole of the property is taken, and there is no other tribunal, under the jurispru-

dence of the state of Texas which could make and enforce such an award, and said act being void when viewed in the light of the constitutional provision of the state of Texas referred to, erected no tribunal competent to award plaintiffs adequate and just compensation for their land sought to be taken under the exercise of the right of eminent domain where less than the whole of the tract is taken.

5.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, chapter 6, of the general laws of the state of Texas, passed by the 32d legislature at its first called session in 1911, denied to the plaintiffs the due process of law guarantied to them by the first section of the 14th amendment to the constitution of the United States, because the tribunal attempted to be erected by said Act has no power thereunder to pass on the judicial questions arising in condemnation proceedings, whereas a tribunal possessing such power is a necessary element in due process of law.

6.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, chapter 6, of the general laws of the state of Texas, passed by the 32d legislature at its first called session in 1911, denied to the plaintiffs the due process of law guarantied to them by the first section of the 14th amendment to the constitution of the United States, because the act challenged provides a rule for determining compensation and restricts the tribunal from awarding just and adequate compensation in the event the regents of the university elect to take less than the whole of the plaintiffs' property described in the bill, because the act challenged makes no provision for, and in fact prohibits the consideration by the tribunal attempted to be erected of the judicial question as to whether the use for which the property is to be subjected is a public use.

7.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them because the legislation challenged in the bill and known as S. B. 20, chapter 6, of the general

laws of the state of Texas, passed by the 32d legislature at its first called session in 1911, denied to the plaintiffs the due process of law guarantied to them by the first section of the 14th amendment to the constitution of the United States, because the act challenged makes no provision for, and in fact forbids the tribunal attempted to be erected to determine the quantity or extent of property which may be subjected to the public use.

8.

The court and judges erred in refusing to grant the plaintiffs the interlocutory injunction as prayed for by them, because in view of the provisions of the sixth section of the act challenged which provides that upon the rendition of judgment by the trial court and deposit of money in the court, possession may be taken pending an appeal, the legal remedies open to the plaintiffs are not as complete and adequate as the preventative remedy through the equitable writ of injunction.

9.

The court and judges erred in refusing to grant to the plaintiffs the writ of injunction prayed by them in view of the sixth section of the act challenged which provides that upon the rendition of

judgment by the trial court and deposit of money in the court, possession may be taken pending an appeal, which leaves the enjoyment of plaintiffs' homestead subject to disturbance under the unconstitutional act prior to final determination in the condemnation proceedings of the validity thereof, and renders legal remedies open to the plaintiffs less complete, adequate and convenient than the preventative relief afforded by a court of equity through the issuance of its writ of injunction.

For which errors found in the record, and because of each of them, the plaintiffs below, now appellants, pray for a reversal of the decree of the district court of the United States for the northern district of Texas entered in this cause refusing to grant to the plaintiffs, now appellants, an interlocutory injunction against the defendants, now appellees, as prayed for in their bill; that said decree refusing to grant the interlocutory injunction prayed for be reversed; and that the court and the judge, or judges thereof, be directed to grant the interlocutory injunction prayed in the bill, and the appellants pray for such other relief as they may be entitled to. (R. 18-22).

ARGUMENT.

Point 1. The nature of the use for which private property is attempted to be taken by condemnation, whether public or private, is a judicial question.

Hairston v. Danville & Western Ry. Co., 208 U. S. 598; Sears v. Akron, U. S. Sup. Ct. Adv. Sheets, No. 9, page 283, April 1, 1918; Shoemaker v. United States, 147 U. S. 282; United States v. Gettysburg Electric Ry. Co., 160 U. S. 668; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama I. P. Co., 240 U. S. 30; Sadler v. Langham, 34 Ala. 311; Logan v. Stogdale, 24 N. E. 136; Lewis on Eminent Domain, vol. 1, page 408, section 158.

Point 2. The measure of compensation for so much of appellants' land as may be taken is a judicial question.

Monongahela Navigation Co. v. United States, 148 U. S. 326, where this court said:

> "By this legislation, congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of

compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In Charles River Bridge v. Warren Bridge, 11 Pet. 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: Commonwealth v. Pittsburgh & Connellsville Railroad, 58 Penn. St. 26, 50; Penn. Railroad v. Balto. & Ohio Railroad, 60 Md. 263; Isom v. Mississippi Central Railroad, 36 Mississippi, 300.

"In the last of these cases, and on page 315, will be found these observations of the court: 'The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its

> own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.' "

In the case quoted from by the supreme court (Isom v. Mississippi Central Railroad, 36 Miss. 300). The supreme court of Mississippi, under their constitution, which is the same as the Texas constitution, except that our constitution substitutes the words "adequate compensation" for "just compensation," further discusses the rule in this language:

> "This court has held, in the case of Brown v. Beatty (34 Miss. 227, 69 Am. Dec. 389), Opinion Book, not yet reported, that a party is entitled not only to the cash value of his land, but to indemnity for the damage done to his adjacent land, consequent on the location of the road; and that too in cash, and not in railroad advantages. See p. 22, Opinion Book.

" 'He was entitled to be paid in money. It was clearly as incompetent for the legislature to prescribe in what he should be paid, as to prescribe how much or how little he should receive. Manifestly, a party whose property has been taken and appropriated to public use, in the construction of a railroad, cannot be compelled to receive, as a compensation, the estimated enhancement in the value of his remaining property. The cash value and the actual damage are the true standards by which to determine the compensation to which, in such cases, the party is entitled.'

"The rule held by this court is this: that, under our constitution, the owner of the land is entitled to 'just compensation' for the damage he sustains, by the application of his land and property to the public use, at the time the public make the appropriation of his private property.

"The value of that property in market at that time, and no other; and the injury then necessarily known to result to the owner, as the necessary and immediate consequence of such public use of his property, without reference to the uncertain or remote benefits or disadvantages that may or may not occur in the future, is what (in legal contemplation) the owner loses."

Circuit judge Colt, in the case of Newburyport Water Co. v. City of Newburyport, 85 Fed. 724, struck down an act of the Massachusetts legislature which provided that in the determination of the value of the property to be taken "such value shall be estimated without enhancement on account of future earning capacity or good-will, or on account of the franchise of said company," said this:

> "It further appears that under the construction given to the act of 1894 by the state court no compensation was allowed the complainant for its franchise rights, further earning capacity, or good-will;"

and predicating his judgment on C. B. & Q. Ry. v. City of Chicago, 166 U. S. 226, held that the State suit was wanting in due process of law as required by the fourteenth amendment, and deprived the Water Works Company of its property without just or adequate compensation.

The principle underlying these decisions is that the determination of adequate or just compensation is a judicial question, and that where the legislature undertakes to make a regulation for the courts, or tribunal, which will prevent the estimation of elements of damage to which the owner is entitled, the act fails to afford due process of law in that it pre-

cludes the party from having a fair hearing before a competent and impartial tribunal on the question of his compensation. Kramer v. Cleveland R. Co., 1 Ohio Dec. 474; Monongahela Nav. Co. v. United States, 148 U. S. 326; Isom v. Mississippi Central R. R., 36 Miss. 300; Newburyport Water Co. v. City of Newburyport, 85 Fed. 724; Lewis on Eminent Domain, (2d. ed.) Secs. 562, 464.

Point 3. The legislature may determine the quantity of property to be taken for a public use and its location, but where it does neither and simply grants the power to take, then in the delegation of the power is implied the condition that it shall only be exercised to the extent, and where found reasonably necessary, which, in this circumstance, are judicial questions.

Highland Boy Gold Mining Co. v. Strickley, 116 Fed. 856. In this case judge Sanborn, speaking for the circuit court of appeals of the 8th circuit, said:

> "That ruling may well have been sustained upon the ground that there had been no evidence offered or introduced to establish the proposition that it was necessary for the defendant to use the premises it was occupying, or any part of the property of the plaintiff, for the purpose of conducting its mining and smelting opera-

tions. **It is always an indispensable prerequisite of the right to exercise the power of eminent domain over the property of an owner of real estate to show that it is necessary to use his property to carry on the business of the quasi public corporation which seeks it.**" Citing some authorities. "There is no proof, and no offer of proof, that it was necessary to use any portion of the property of the plaintiff to conveniently conduct the business of the defendant. In the absence of this and other evidence which would warrant this company in exercising its right of eminent domain, if it has that right, there was no error in the refusal of the court to permit it to prove the value of this property, nor in its instruction to the jury to return a verdict for the plaintiff."

In Huntley v. Osborn, 198 S. W. 1115, the supreme court of Missouri said:

"Without doubt the legislature has the right to declare by a general statute that the drainage of lands for sanitary or agricultural purposes is an act of public utility, that it constitutes a public use, for the constitution in express terms declares such uses to be public and not private uses. Section 20, article 2, constitution of 1875. But the determination of this question in any given instance is necessarily to be relegated to a

judicial determination. There is always left to be judicially determined the question whether any particular improvement proposed will inure to the public health or welfare; in short, whether there connotes in the instance at hand a public use of the private property proposed to be taken. In the view of the amendment taken by relators, no provision exists for such determination, and the statute would be void."

New Central Coal Co. et al. v. George's Creek Coal Co. et al., 37 Md. 537, 15 Cyc. 632, and cases cited in notes 13, 14 and 15, Cooley's constitutional limitations, 6th edition, page 664, et seq.

The reference to the text of Cyc. is as follows:

"IX. NECESSITY AND EXTENT OF APPROPRIATION.

"A. IN GENERAL. The extent to which property shall be taken for public use rests wholly in the legislative discretion, subject to the limitation that due compensation be made. The legislature may determine the amount of land necessary to be taken and the location. It may designate the particular property to be condemned, and its determination in this respect cannot be reviewed by the courts.

"B. ON DELEGATION OF POWER—1. In General. To authorize the condemnation of any particular land by a company to which the power has been delegated, a necessity must exist for the taking thereof for the uses and purposes of the party instituting the proceedings, and this must be made to appear. And it is never permissible for a company or individual to appropriate more land than is necessary for its use. There is of course a prohibition against excessive appropriation, or the taking of any land not within the scope of the purpose required. The moment the appropriation goes beyond the necessity of the case it ceases to be justified on the principles which underlie the right of eminent domain. Nevertheless, necessity, within the meaning of this rule, does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner consistent with such benefit, although it does not include the taking of land which may merely render the employment of the improvement more convenient or less expensive, or for a necessity which is merely colorable."

In Shoemaker v. United States, 147 U. S. 284, the act under consideration provided that the quantity of land to be taken should not exceed 2,000 acres and

the cost thereof should not be in excess of a certain amount appropriated.

In United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, the quantity of land to be taken was fixed by congress by the amount of an appropriation. The total value of the land to be taken was limited to $1,200,000. Again, in both of these cases, the location of the land on the ground was made by congress, and the quantity of it to be taken fixed, either by designation of the land itself, or by the amount of the appropriation. Besides the complaint in each of these cases was not that too much, but that too little land was being taken. That is to say, the government was not taking enough of the land of citizens for public use, rather than taking too much, and to meet this objection the supreme court said that the question as to the extent of the taking as applied to these cases was with the legislature and not with the courts.

In Adirondack Ry. Co. v. New York State, 176 U. S. 335, the extent of the appropriation was also passed on directly by the legislature of New York, which had fixed the boundaries of a state park including within the boundaries lands belonging to private parties, and the commissioners of the forest reserve were given power to acquire these lands.

In each of these cases the legislature acted directly in fixing the quantity that might be taken, and did not delegate the power as here. In other words, in these cases, within certain limits, the legislature provided that all the land might be taken for the public use, but by the act under consideration it will not be contended that the legislature authorized the taking of all the land in Galveston and Travis counties. On the contrary it contemplated that only a very small portion, comparatively, of such lands should ever be taken, and delegated the extent of the taking.

In Croley v. St. Louis Southwestern Ry. Co., 56 S. W. 615, also relied on below by appellees, the legislature designated the quantity of land that might be taken. That is, a strip 200 feet in width, and the court said that in view of this designation by the legislature, "It has thereby determined the necessity for the designated width and that question is not a proper one for judicial ascertainment." The court was clearly right in its conclusion.

The appellants in view of section 720 of the United States revised statutes, could not await the disclosure of the intention of the regents as to whether they would undertake to condemn the whole or only a part of the appellants' land. Neither can

they now rest on the assurance of the existing board that the whole and not a part of the land will be taken, because the regents change in personnel and can, unless the injunction prayed for shall restrain them, cause to be filed a petition for the condemnation of less than the whole of the land, which filing of itself would oust the jurisdiction of the court below over another suit to afford the appellants on any ground the injunctive relief for which they pray herein.

Point 4. Due process of law includes as an essential element that appellants' property can only be expropriated by a competent tribunal clothed with jurisdiction to hear and determine the judicial questions at issue.

The judicial questions are : (a) the nature of the use; (b) the necessity for and amount of the expropriation; (c) just compensation. In Searl v. School District, 133 U. S. 562, this court discussing proceedings in the exercise of the right of eminent domain, said:

> "That right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised except upon condition that just compensation shall be made to the owner, and

> it is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it."

Again, in Backus v. Fort Street Union Depot Co., 169 U. S. 568, in discussing whether there had been a denial of the right to that protection to property which is guarantied by the fourteenth amendment to the federal constitution, this court said:

> "It is within the power of the state to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by the sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form bases of fundamental right. **All that is essential is that in some appropriate way before some properly constituted tribunal inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the federal constitution."** Citing Bauman v. Ross, 167 U. S. 548, 593.

Judge Baker, of the circuit court of Indiana, in the case of Charles v. City of Marion, et al., 98 Fed. 168, recognizes the rule that due process can only flow from a duly constituted tribunal in the following language:

> "There is no provision of the statute of this state called to the attention of the court which points out the method, or confers authority upon the common council to hear and determine the question of actual benefits received by the property of the land-owner by the construction of a street improvement. It is not sufficient to constitute due process of law, that the statute provides for a hearing and notice. It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved. If the hearing had before the common council was to determine the benefits actually received by the property owner, it is strange, indeed, that the statute commands the engineer to make and report his assessment and estimate upon a basis which wholly disregards, and, in effect, forbids, his considering the question of benefits at all. In my opinion, there is no provision of the statute that provides a tribunal, and clothes it with power, and points out

> the method of its procedure for the purpose of ascertaining and determining the benefits actually received by the property of a land-owner by the construction of a street improvement."

Brannon, in his work on the fourteenth amendment, says of the Backus case:

> "In the Backus case just cited it was held that as regards what court should determine the question of compensation or the form of procedure, all that is essential is that **'in some appropriate way, before some properly constituted tribunal, inquiry shal be made as to the amount of compensation**; and when this is provided for there is that due process of law which is required by that amendment.'" p. 466 et seq.

There must be an appropriately constituted tribunal to pass on the question of just compensation, and this tribunal must award some compensation, after a reasonable opportunity has been afforded the owner to be heard on the question of compensation. The pivot on which these essentials turns is a properly constituted tribunal with appropriate power. No properly constituted tribunal can be raised by the provisions of an act which withholds the power to pass on any question save the value of the land taken. Such tribunal is not competent to decide the judicial questions which must arise on the issue of public use

and, where the legislature has not determined the location and extent of the taking, and less than the whole is taken.

Black, on constitutional law, (3d ed.), pp. 587, 588, states the rule thus:

> "As applied to judicial proceedings, the requirement of due process of law involves the action of a competent and impartial tribunal possessing jurisdiction and clothed with authority to hear and determine the questions at issue, and following a regular and orderly course of legal procedure according to the rules established for the enforcement and vindication of private rights, and of which the party to be affected shall have such actual or constructive notice as is appropriate to the case and necessary to confer jurisdiction, and in which he shall have a full and fair opportunity to plead and to support his rights, claims, or defenses, as the case may be."

That a competent tribunal is a component part of due process of law is not elsewhere more emphasized than in the jurisprudence of Texas.

In the case of Oates v. State, 121 S. W. 376, the court of criminal appeals of this state, a court of last resort in such matters, said this:

> "If the tribunal which condemned this man to die was not presided over by a district judge

duly chosen and selected according to law, it had no more legal right to take his life, guilty or innocent, than a mob at night. There can be no court, in a legal sense, without a judge, and there can be no judge except as he may be elected and chosen under the constitution and agreeably to law. It therefore results that, however eminent in learning and however fair in fact may be the person who presides over the trial, unless he is in a legal sense a district judge the gathering masquerading as a court becomes of no higher dignity than the same number of respectable gentlemen gathered by chance on the street corner."

As by the act of the legislature in question here, no tribunal has been constituted with power to hear and determine the nature of the use, the necessity for and extent of the expropriation, or to award just compensation, an essential element in due process, as guarantied by the fourteenth amendment to the constitution of the United States, is lacking in those procedings by which the appellants' property rights are threatened. 14th amendment, section 1, constitution United States; Searl v. School District, 133 U. S. 562; Backus v. Fort Street Union Depot Co., 169 U. S. 568; Boom Co. v. Patterson, 98 U. S. 403; United States v. Jones, 109 U. S. 513; Cherokee

Nation v. Kansas Ry., 135 U. S. 641; C. B. & Q. Ry. v. Chicago, 166 U. S. 226; Sweet v. Rechel, 159 U. S. 380; In re Manderson, 51 Fed. 501; Bonaparte v. Camden, 3 Fed. Cas. No. 1617; Oates v. State, 121 S. W. 376; Brannon on 14th amendment, pp. 466 et seq.; Cooley on const. limitations, (6th ed.), pp. 648 et seq.; Black on constitutional law, (3d. ed.), pp. 587, 588.

The act relied on for power to condemn the appellants' land is as follows:

> "An act to authorize and empower the board of regents of the university of Texas to acquire by purchase or condemnation for the use and benefit of the university of Texas such lands within the counties of Travis and Galveston as they may deem expedient for sites on which to erect and maintain buildings and for the extension of the campus and other purposes in the conduct of the said university, and declaring an emergency.
>
> Be it enacted by the legislature of the state of Texas:
>
> **Section 1.** Power and authority is hereby conferred upon the board of regents of the university of Texas to acquire by purchase or condemnation for the use and benefit of the university of Texas such lands within the coun-

ties of Travis and Galveston as they may deem expedient for sites on which to erect buildings for the use of the said university and for the extension of the campus and for other purposes necessary in the conduct of the said university.

Section 2. If the said board of regents, in seeking to acquire any lands for any of the purposes aforesaid and the owner or owners of said land cannot agree for the sale and purchase thereof, the board of regents shall request the attorney general to file a petition in the district court of the county in which the land sought to be condemned is situated, describing the land and stating the purposes for which it is desired by the board of regents, and praying that the value of such land be ascertained judiciously and a decree be entered vesting title thereto in the state of Texas for the use and benefit of the university of Texas upon the payment of the value so ascertained.

Section 3. Upon the filing of any such petition by the attorney general, the clerk of the court shall issue a citation to the owner or owners of the land as in other civil cases, which citation shall be served and returned as in civil cases, and the cause shall be entered on the civil docket in the name of the board of regents of the university of Texas as plaintiff and the owner or owners of the land as defendant.

Section 4. At the first term of the court after service of citation upon the owner, as provided in the preceding section, the cause, unless continued on motion thereof, shall be tried by a jury upon a single issue as to the value of the land, and the decision of any such jury shall in all cases be final; provided the parties to said proceeding shall have the right of appeal as in other civil cases.

Section 5. Nothing in the preceding section contained shall be construed to prevent the parties from waiving a jury and submitting to the court the issue as to the value of the land in question, or from selecting by agreement three persons to ascertain the value of such land, under their oaths and the direction of the court; and the finding and decision of the court or of such persons shall in all cases be final; provided the parties to said proceding shall have the right of appeal as in civil cases.

Section 6. When the value of the land has been ascertained in either of the modes above prescribed, and the court is satisfied with such valuation, it shall enter a decree vesting the title in such lands in the state of Texas for the use and benefit of the university of Texas, to be held, owned, possessed and enjoyed by the state of Texas for the purposes hereinbefore recited. No such decree shall be entered until the value of

the land so ascertained, together with all reasonable costs and expenses of the owner in attending such proceeding, shall be paid to him, or into court for his benefit and subject to his order, such costs and expenses to be assessed by the court for which any such proceeding is had, including reasonable attorney's fees to be fixed by the court.

Section 7. The fact that there is no adequate law authorizing the board of regents to acquire such land as may be needed for the purposes aforesaid, creates an emergency and an imperative public necessity that the rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and this act shall take effect and be in force from and after its passage, and it is so enacted.

Approved August 30, 1911.

Becomes a law ninety days after adjournment." (R. 2-3).

The act, in cogent and incisive language directs that the trial shall be **"upon a single issue as to the value of the land."** Under the mandatory language of the act there can be no inquiry as to the damaging effect the taking will have on the adjacent property of the owner, yet under the provisions of our state constitution this damage becomes property for which

compensation must be made before any of the land can be taken. Section 17, article 1, of the Texas constitution reads as follows:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made unless by the consent of such persons; and, when taken, except for the use of the State, such compensation shall be first made or secured by the deposit of money; * "

Damage to remaining property is one of the elements of just compensation when land is taken through the exercise of eminent domain, and the right to it is secured to the owner of land taken in the same article of the constitution which protects him as to the value of the land. Perhaps it is true that the legislature may provide for off-setting against these damages such special benefits as the owner might receive in consequence of the public use, whereas (under the state constitution) such offset could not be made to reduce that part of the compensation consisting of the value of the land taken. But to provide for taking land without providing for a hearing on the question of damages to adjacent land of the owner is a palpable violation of the constitutional provision quoted and places the act relied on

in clear confiict with section 17, article 1 of the Texas constitution.

Sec. 17, Art. 1, Texas constitution;
S. A. & A. P. v. Ruby, 80 Tex. 172;
Texas Western Ry. v. Cave, 80 Tex. 137;
Hamilton County v. Garrett, 62 Tex. 602;
Woolridge v. Eastland County, 70 Tex. 680;
McCammon et al. v. Trin. & B. V. Ry., 133 S. W. 247;
St. L. A. & T. Ry. v. Henderson, 86 Tex. 307;
Fordyce et al. v. Wolfe, 82 Tex. 239;
T. & P. Ry. Co. v. Edrington, 100 Tex. 496.

Point 5. The tribunal erected by the act relied on being denied thereby power to award the adequate compensation provided by section 17, article 1 of the Texas constitution, or to decide the other judicial questions, because confined in its investigation to the single issue of the value of the land, is not in substance a properly constituted tribunal clothed with appropriate power, which is one of the essential elements of that due process of law guarantied by the first section of the fourteenth amendment of the constitution of the United States.

The section of the amendment referred to is in the following language:

> "All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty or property without due process of law,** nor deny to any person within its jurisdiction the equal protection of the law."

The legislature of a state has large but not quite unlimited power in the exercise of eminent domain. Under the federal instrument there are few requisites to the legitimate exercise of this power. Yet there are some. One of the requirements is that the right of eminent domain can not be exercised without making adequate provision for just compensation; and this compensation must be arrived at in some appropriate way before some **properly constituted tribunal.** Unless this requirement is met due process of law is lacking. There must be an opportunity for the owner to be heard in respect of his compensation in some appropriate way before some properly constituted tribunal clothed with the necessary power, but the details and method and manner of the hearing are within the discretion of the state legislature. The tribunal attempted to be erected by the legislature in the instant case, lacking

the power to meet the requirements of the state constitution as to the end of its creation, is an unconstitutional tribunal and a moot court while attempting to act under the statute relied on.

Point 6. The constitutional protection afforded by the statute is not to be tested by an inquiry whether just and good men might under its terms award adequate compensation and otherwise fully protect the owner of the property, but the test is what may be done under it by unjust and bad men.

The supreme court of California in the case of City of Los Angeles v. Lewis, 167 Pac. 393, said:

> "It has been said to save even a legislative enactment nothing can be read into it or read out of it. The supreme test of the validity of any such law is not what may have been done under it, not as here what the contracting parties may by convention agree to do or not to do under it, but it is what may be done under it. Lewis' Sutherland Stat. Cons. Section 107; City of Beatrice v. Wright, 77 Neb. 689, 101 N. W. 1039; State v. Stark County, 14 N. D. 368, 103 N. W. 913; Stewart v. Palmer, 74 N. Y. 183, 30 Amer. Rep. 289; Minneapolis Brewing Co. v. McGillivary (C. C.) 104 Fed. 258; State v. O'Leary, 43 Mont. 157, 115 Pac. 204. No man

can doubt but that under this law a county acquiring a cement plant is authorized to manufacture all of the cement which said plant can produce and sell all that it desires to private consumers. To deny this right and power under the law is to destroy the law itself and to frame a law distinctly to the contrary of that which the legislature deliberately and advisedly formulated and passed. So plain is this that respondents can not successfully urge the severability of the statute and that a part of it can be saved by a construction limiting the cement production to the public needs of the county; for this, as we have said, would be to make a law which the legislature has not made and which requires legislative deliberation and determination before it can be made."

The supreme court of North Carolina in Commissioners of Johnson County v. Lacy, State Treasurer, 93 S. E. (L. C.) 485, quoting from a former decision uses this language:

> "It is no answer to this position that, in the particular case before us, no harm is likely to occur, or that the power is being exercised in a beneficient manner; for, when a statute is being squared to the requirements of constitutional provisions, it is what the law authorizes, and not what is being presently done under it, that furnishes the proper test of validity."

Under the present law the board of regents may file a petition to take less than the whole of appellants' property. Should they do so under the act no inquiry can be made as to the damage to that portion of the property not taken, nor as to how far, if at all, such damage would be off-set by resulting benefits, yet this court has recently said:

> "The fundamental right guarantied by the fourteenth amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation. There is no guaranty that he shall derive a possible pecuniary advantage from a public work whenever a neighbor does. It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefit conferred upon it;—compensation to the owner in that form is permissible. And we are unable to say that he suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, that there has been no real injury.

This subject was much discussed in Bauman v. Ross, 167 U. S. 548, 574, 584. Through Mr. Justice Gray we there said: 'The just compensation required by the constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public. Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. . . . The constitution of the United States contains no express prohibition against considering the benefits in estimating the just compensation to be paid for private property taken for the public use; and for the reasons and upon the authorities above stated, no such prohibition can be implied;

and it is therefore within the authority of congress, in the exercise of the right of eminent domain, to direct that, when a part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.' See Martin v. District of Columbia, 205 U. S. 135; McCoy v. Union Elevated R. R. Co., U. S. supreme court advance opinions, July 1, 1918, p. 617."

Proceding under the terms of the act relied on, the appellees, unless restrained, may file a petition for the condemnation of either the whole or any part of appellants' land and foreclose an inquiry as to the nature of the use, or the necessity for the taking, or to the extent sought to be taken, or as to the amount of damage or benefit to that part of the property not taken.

The legislature is not competent ultimately to declare a public use, which is a judicial question, and having failed to fix the location or the extent of the taking as regards appellants' land, these questions also became judicial in the instant case, yet the legislature has undertaken to erect a tribunal which is forbidden to decide them and also the judicial question of adequate and just compensation where a portion of the land is taken, thereby rendering it possible under the act to deprive the appellants' of their property without the due process of law.

Due process of law protects the citizen in the right to a hearing on all judicial questions involved in the taking of his property. It is no answer to the complaint that a hearing has been denied him to say that had he had a hearing the decision would have been against him. Whether the taking is for public use being a judicial question, he is entitled to a hearing on it despite the fact that most persons may think the decision would be against him. And so as to the question of the necessity and extent of the taking of the specific property. Nor is it an answer to his complaint that a part of his property may be taken without adequate and just compensation being made to him to say that the present purpose of a changing

board is not to take less than the whole of it. The fundamental instrument relied upon by appellants' affords them a better protection than either of these suggestions constitutes.

Appellants pray that the decree appealed from be reversed and the cause remanded with instructions to award the interlocutory injunction prayed for in the bill.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Appellants.

SUBJECT INDEX.

PAGE.

Statement of the case 1
The Act of the Legislature before the court 2
Status of the University 4
The Board of Regents 5
Counter proposition to the effect that the law before the court is not a local or special law in violation of Sec. 56, Art. 3, of the Constitution of Texas 7
Counter propositions to the effect that the law before the court is not a local or special law in violation of Sec. 57, Art 3, of the Constitution 12, 13
Counter proposition to the effect that appellants cannot complain that the Act does not provide for consequential damages, since the whole of their land is to be condemned 15
Counter proposition to the effect that the Legislature rightfully conferred upon the Board of Regents the authority to determine the necessity of condemning appellants' land, and the identity and quantity of the land to be condemned 19
Counter proposition to the effect that the Act does not provide for possession of the land by appellees pending appeal, but does provide for supersedeas of the judgment 26

APPENDICES.

Appendix A, sections of the Texas Constitution relating to the University 29
Appendix B, constitutional provisions relating to the Board of Regents 30
Appendix C, statutes fixing the terms of office of the Board of Regents 30
Appendix D, various articles of the statute governing the University 32
Appendix E, various statutes relating to appeals and supersedeas 38
Appendix F, the Act of the Legislature under attack 40

LIST OF CASES.

PAGE.

Adirondack Ry. Co. vs. N. Y., 176 U. S., 335 (349).....20, 24
Annotated Cases, 1913-C, p. 1283..... 16
Board of Education vs. Hackman, 48 Mo., 243..... 5
Bowman vs. State, 40 S. W., 796..... 16
Buchanan vs. Graham, 81 S. W., 1237 (1239)..... 6
Carnegie Natural Gas Co. vs. Swiger, 46 L. R. A. (N. S.), 1073 (1079) 7
Chappell vs. United States, 160 U. S., 499 (510).....20, 24
Clark vs. Finley, 93 Texas, 171 (178-180)..... 7
Click vs. Lamar Co., 79 Texas, 121.....20, 24
Cooley's "Constitutional Limitations," 6th Ed., pp. 196, 655, 661, 663.....5, 16, 20, 24
Coyle vs. Smith, 113 Pac., 945 (948)..... 7
Cravens vs. State, 122 S. W., 29 (31)..... 13
Crowley vs. St. L., etc., Ry. Co. of Texas, 56 S. W., 615..... 20
4 Ency. U. S. Rep., pp. 897, 991.....20, 26
Galveston vs. Brown, 67 S. W., 156.....20, 24
Hall vs. Bell County, 138 U. S., 178..... 7
Harris vs. Hopson, 5 Texas, 533.....20, 26
Harwood vs. Wentworth, 162 U. S., 547 (562)..... 7
Hooker vs. Burr, 194 U. S., 415 (419)..... 16
Johnson vs. Galveston Co., 85 S. W., 511.....20, 24
Kimbrough vs. Barnett, 93 Texas, 301 (310)..... 6
Kohl vs. United States, 91 U. S., 367.....20, 24
Lindsey vs. Luckett, 20 Texas, 520.....20, 26
Logan vs. State, 111 S. W., 1029..... 27
Long vs. Fuller, 68 Pa. State, 170..... 5
Moller vs. City of Galveston, 57 S. W., 1116 (1120)..... 13
Pittsburg, etc., Ry. Co. vs. Sanitary Dist. of Chicago, 2 L. R. A. (N. S.), 226 (229)..... 20
Plumb vs. Christi, 42 L. R. A., 181..... 16
Reed vs. Acton, 117 Mass., 384..... 5
Reed vs. Rogan, 94 Texas, 177 (193)..... 7
6th Ruling Case Law, Sec. 87, p. 89..... 16
10th Ruling Case Law, Sec. 167, p. 195.....20, 24
10th Ruling Case Law, Sec. 158, p. 183..... 20

San Antonio, etc., Ry Co. vs. Southwestern, etc., Telephone Co., 93 Texas, 313 (322).....20, 24
Searl vs. School District No. 2, 124 U. S., 197..... 5
Searl vs. School District No. 2, 133 U. S., 553 (562)..... 5
Shoemaker vs. U. S., 147 U. S., 282 (289)..... 20
So. Ry. Co. vs. Memphis, 41 L. R. A. (N. S.), 828 (834).... 20
State vs. Blake, 144 S. W., 1094..... 16
State vs. Larkin, 90 S. W., 912 (917)..... 13
Sweeney vs. Webb, 76 S. W., 766 (770)..... 16
Travis Co. vs. Trogden, 88 Texas, 302.....20, 24
Turpen vs. Lemon, 187 U. S., 51 (60)..... 16
Tyler vs. Judges, etc., 179 U. S., 405..... 16
U. S. vs. Gettysburg, etc., Ry. Co., 160 U. S, 668..... 20
Vernon's Sayles' Civil Statutes, Vol. 2, Title 37, Chapter 20, and, particularly, Articles 2097, 2098, 2099, 2101, 2103.. 27
Walker vs. Howard, 30 S. W., 1096.....20, 26
Williams vs. School District No. 6, 33 Vt., 271..... 5

A355-918-75

No. 890.

In the Supreme Court of the United States

OCTOBER TERM, 1918

MARY CAVANAUGH AND JAMES CAVANAUGH,
APPELLANTS,

vs.

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF TEXAS, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS UNDER SECTION 129, JUDICIAL CODE.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This suit was brought by Mary Cavanaugh and her husband, James Cavanaugh, against the members of the Board of Regents of the University of Texas and against the Attorney General for the purpose of restraining them, in their official capacities, from taking action under Chapter 6, General Laws of the State of Texas, passed by the Thirty-second Legislature at its First Called Session (1911), which law authorizes the Board of Regents and the Attorney General, acting in their several official capacities, to condemn lands for the use and benefit of the University of Texas.

This action was begun by appellants by the filing of their orig-

inal bill in the United States Court for the Northern District of Texas on April 20, 1916. (R., p. 1.)

On the same date the Honorable E. R. Meek, United States District Judge, granted the restraining order. (R., p. 8.)

On November 10, 1916, an order was entered setting down for hearing the appellants' application for an interlocutory injunction, and the Honorable R. W. Walker, United States Circuit Judge for the Fifth Circuit, and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, were called to the assistance of the Honorable E. R. Meek, United States District Judge, to hear the application for interlocutory injunction. (R., p. 8.)

The case was afterwards heard by the judges named, and on November 29, 1916, a decree was entered refusing the application for an interlocutory injunction and dissolving the restraining order previously entered. (R., p. 16.)

The appellants in due form have brought this case before the Supreme Court for review. (R., pp. 18 to 25.)

The Act of the Legislature Before the Court.

This Act of the Legislature, in substance, provides that the Board of Regents of the University shall have authority to acquire, by purchase or condemnation, for the use and benefit of the University, such lands within the counties of Travis and Galveston as they may deem expedient for sites on which to erect buildings, and for the extension of the campus, and other purposes necessary in the conduct of the University. The act also declares that if the Board of Regents, in seeking to acquire any lands for the purposes named, cannot agree with the owners for the sale and purchase thereof, then they shall request the Attorney General to file a petition in the district court in the county in which the lands sought to be condemned are situated, describing the land and stating the purposes for which it is desired by the Board, and praying that the value of the land shall be ascertained judicially and a decree entered vesting title in the State of

Texas for the use and benefit of the University, when paid for at the rate of such ascertained value.

Provision is made in the law for the filing of the petition by the Attorney General, the issuance and service of citation, and, generally, the trial of the case, in the ordinary form of civil actions. The act, however, declares that the case shall be tried upon "a single issue as to value of the land," but provides for appeals as in the ordinary action. When the value of the land has been ascertained, and the court is satisfiled with the valuation, it is made the court's duty to enter a decree vesting title to such lands in the State of Texas for the use and benefit of the University of Texas, to be held, owned, possessed and enjoyed by the State of Texas for the purposes stated in the act. The decree, however, is not to be entered until the value of the land as ascertained, together with all reasonable cost and expenses of the owner in attending such proceedings, shall have been paid to him or into court for the benefit of such owner, such cost and expenses to include reasonable attorney's fees to be fixed by the court.

This act of the Legislature is published in full in Appendix "F" to this brief. It was contended by appellants in the court below that this act violated the Constitution of the State of Texas in four particulars, as follows:

(a) That it is a local and special law passed in violation of Article 3, Section 56, of the Constitution of this State, which prohibits the passage of any local or special law regulating the practice or jurisdiction of the courts of the State; and also in violation of Article 3, Section 57, of the Constitution of this State, which provides that local and special laws shall not be passed unless notice of the intention to apply therefor shall have been published for thirty days prior to the introduction of the bill in the Legislature, etc.

(b) That the act is in violation of Article 2, Section 1, of the Constitution of this State, in that it delegates judicial authority to the Board of Regents to determine what property shall

be taken under condemnation proceedings and the quantity which shall be taken.

(c) That the act violates Article 1, Section 17, of the Constitution of this State, in that it makes no provision for inquiry into and payment of damages to property not taken by condemnation where a portion of the same tract is taken.

(d) That the act violates the Fourteenth Amendment to the Constitution of the United States, in that it permits the Board of Regents to acquire property in fee by condemnation, which it could, in turn, resell for private use.

These propositions will be discussed in the light of the assignments of error made by the appellants further along in this brief, but we deem an inquiry into the status of the University of Texas and its Board of Regents appropriate, if not necessary, for a clearer discussion of the issues in this case; and as to these we will now make a brief statement before considering the errors assigned by appellants.

Status of the University.

The University of Texas is a creation of the Constitution of the State. Section 10, Article 7, of the Constitution, declares:

"The Legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a university of the first class, to be located by a vote of the people of this State, and styled 'The University of Texas,' for the promotion of literature, and the arts and sciences, including an agricultural and mechanical department."

Sections 11, 12, 13, 14 and 15 of the same article of the Constitution relate to other details of the establishment of the University and its branches, the Agricultural and Mechanical College and what is now called the Prairie View Normal College for colored people. These several sections of the Constitution are quoted in full in Appendix "A" to this brief. From these provisions of the organic law of the State of Texas we are convinced that the

issue as to whether or not the University of Texas is a public institution, engaged in a public business, and for the use of which lands may be taken under power of eminent domain, is not the subject in debate.

Cooley's "Constitutional Limitations," 6th Ed., pp. 655, 661.
Searl vs. School District No. 2, 133 U. S., 553 (562).
Searl vs. School District No. 2, 124 U. S., 197.
Reed vs. Acton, 117 Mass., 384.
Board of Education vs. Hackmann, 48 Mo., 243.
Long vs. Fuller, 68 Pa. State, 170.
Williams vs. School District No. 6, 33 Vt., 271.

The Board of Regents.

The Board of Regents of the University of Texas are officers whose office is created by the Constitution of the State. Section 30a, Article 16, of Harris' Annotated Constitution, is the amendment adopted November 5, 1912, authorizing the Legislature to make the terms of office of the Board of Regents of the University six years, and providing for the filling of such vacancies as may occur, etc. This section of the Constitution is printed as Appendix "B" to this brief.

By authority of the constitutional provisions just referred to, the Legislature passed an Act fixing the membership of the Board of Regents of the University of Texas at nine persons, the qualifications of whom are defined in this Act. The measure also declared the method of selection, nomination, appointment, etc., and divided the Board into classes. This Act of the Legislature is shown in full in Appendix "C" to this brief.

The Revised Statutes of Texas, Article 2636, vests the management of the University in the Board of Regents, of the number and selected in the manner heretofore referred to. Article 2638 provides that the Board of Regents shall have the right to make and use a common seal; Article 2640 confers authority upon this Board to remove any professor, tutor, or other officer connected

with the University; Article 2644 prohibits expenditures except such as shall be made upon the order of the Board of Regents; Article 2633 declares:

"The Board of Regents of the University of Texas are invested with the sole and exclusive management and control of the lands which have been heretofore, or which may hereafter be, set aside and appropriated to, or acquired by, the University of Texas, with the right to sell, lease and otherwise manage, control and use the same in any manner, and at such prices and under such terms and conditions as may to them seem best for the interest of the University, not in conflict with the Constitution of this State; provided, that such land shall not be sold at a less price per acre than the same class of land of other funds may be sold at under the statutes."

It is unnecessary that we make special reference at this time to the various articles of the statutes governing the University of Texas. Articles 2626 to 2654, inclusive, will be found in the back of this brief as Appendix "D," and relate to the University of Texas and its management and government by the Board of Regents.

From what we have said, however, we think it clear that the Board of Regents of the University of Texas are public officers, administering part of the government. In fact, the Supreme Court of this State has heretofore gone so far as to hold that school trustees of the ordinary independent school districts are public officers.

Kimbrough vs. Barnett, 93 Texas, 301 (310).
Buchanan vs. Graham, 81 S. W., 1237 (1239).

Having thus determined that the University of Texas is a public institution, owned and conducted by the State by authortiy of its Constitution for the use of all the people of the State, and that its Board of Regents are public officers administering a function of government, we will next address our remarks to the constitutional questions raised.

COUNTER PROPOSITION UNDER APPELLANTS' FIRST AND SECOND ASSIGNMENTS OF ERROR.

The first proposition insisted on by appellants is that the Act of the Legislature in question is a local or special law, passed in violation of Article 3, Section 56, of the Constitution of this State, which, in effect, declares that a local or special law cannot be passed regulating the practice or jurisdiction of or changing the rules of evidence, etc., in any judicial proceedings or inquiry before the courts. The question is, is the law before us a local or a special law?

Our counter proposition is, that the law before the court is not a local or special law, and is therefore not within the inhibitions of the constitutional provision referred to.

AUTHORITIES.

Clark vs. Finley, 93 Texas, 171 (178-180).

Harwood vs. Wentworth, 162 U. S., 547 (562).

Hall vs. Bell County, 138 U. S., 178.

Logan vs. State, 111 S. W., 1029.

Reed vs. Rogan, 94 Texas, 177 (193).

Coyle vs. Smith, 113 Pac., 945 (948).

Carnegie Natural Gas Co. vs. Swiger, 46 L. R. A. (N. S.), 1073 (1079).

ARGUMENT.

The definition of general and special laws, as adopted and followed by the Supreme Court of this State, is as follows:

"A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is a special law and comes within the constitutional prohibition."

A local law is thus defined by the Texas Supreme Court:

"We have found no very satisfactory definition of a local law, but it seems to us that it is one the operation of which is confined to a fixed part of the territory of the State."

The foregoing definitions are taken from the case of Clarke vs. Finley, 93 Texas, 171 (178-180), the opinion in which was written by Chief Justice Gaines, and may be regarded as authoritative in the State of Texas, or as an authoritative construction of the particular provisions of the Constitution of this State now under examination.

It seems to us that any argument in support of the proposition that this law is neither a local or special law would be a work of supererogation. The location of a public institution such as the University, the State Capitol, or a State Normal, is necessarily confined to one, or, at the most, a few counties, for it could hardly be said that the buildings of the University of Texas could be located all over the State. We therefore conclude that the mere fact that only lands in Travis and Galveston counties are authorized to be condemned would not be sufficient to make this law a local law. It is a fact, publicly and judicially known, that the University of Texas proper is located at Austin, in Travis county, while its medical branch,—it is within itself a large and important institution,—is located in the city of Galveston, in Galveston county; but these institutions are in no sense of the word local institutions, nor is anything which is done for or concerning them local in its purpose or in effect. And with even less force could it be argued that any law concerning the Univerity of Texas is a special law, because the University of Texas embraces all and is the whole of its class. Whatever is done for, concerning or with the University of Texas is done for all the people of the State, and affects all its people.

In the case of Coyle vs. Smith, 113 Pac., 944, the Act before the court for consideration was one passed by the Legislature of the State of Oklahoma and being "an Act providing for the permanent location of the seat of government and the capital of the State of Oklahoma, creating a board of capital commissioners and defining its powers and duties, authorizing the Governor to accept for capital purposes the proceeds of the sale of land, or donations from other sources, and declaring an emergency." The caption

very well discloses the purpose of the measure, and we will not enter upon a description of its details. The Supreme Court of Oklahoma held that this Act was neither a special nor a local law within the meaning of the Oklahoma Constitution, the Oklahoma Constitution declaring, as does our own, that local and special laws cannot be considered by the Legislature until notice has been published, etc. Concerning this, the Supreme Court held, as suggested, that the law was neither a local nor a special one, and, in part, said:

"Section 32 of Article 5 of the Constitution provides 'that no special or local law shall be considered by the Legislature until notice of the intended introduction of such bill or bills shall first have been published for four consecutive weeks in some weekly newspaper published or of general circulation in the city or county affected by such law, stating in substance the contents thereof, and verified proof of such publication filed with the Secretary of State.'

"In Cordova vs. State, 6 Texas App., 218, it is said: 'An ordinance passed by the Convention of 1875, which framed our present State Constitution, fixes the terms of the holding of the District Court in the county of Bexar to the fourth Mondays in April and October, until otherwise provided by law. Article 5, Section 7, of the Constitution, reads as follows: "The State shall be divided into twenty-six judicial districts, which may be increased or diminished by the Legislature. For each district, there shall be elected by the qualified voters thereof, at a general election for members of the Legislature, a judge, who shall be at least twenty-five years of age, shall be a citizen of the United States, shall have been a practicing attorney or a judge of a court of this State for a period of four years, and shall have resided in the district in which he is elected for two years next preceding his election; * * * and shall hold the regular term of court at one place in each county twice in each year, in such manner as may be prescribed by law. The Legislature shall have power, by general act, to authorize the holding of special terms, when necessary, and to provide for holding more than two terms of the court in any county, for the dispatch of business." Article 3, Section 57, of the Constitution is as follows: "No local or special law shall be passed, unless notice of the intention to apply therefor shall have been published in

the locality where the matter or thing to be affected may be situated, which notice shall state the contemplated law, and shall be published at least thirty days prior to the introduction into the Legislature of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the Legislature before such Act shall be passed." The defendant claims that the Act of the Legislature which gives five terms of the District Court to Bexar county is in contravention of the provisions of the Constitution, and is, therefore, null and void. All acts of the Legislature must be sustained by the courts, unless they are clearly and undoubtedly repugnant to the Constitution. The judiciary looks to the acts of the Legislature with just respect, and reconciles them with the Constitution, and sustains them, if possible. In expounding a constitutional provision, such construction should be employed as will prevent any clause, sentence, or word from being superfluous, void or insignificant. The thing to be sought is the thought expressed. Contemporaneous legislative construction is always considered in force. The Constitution, in express term, having conferred upon the Legislature the power, by general law, to provide for more than two terms of the District Court in any county, the Legislature, in passing the Act under consideration, has, we believe, kept within its constitutional limits. The Act which provides for five terms of the District Court of Bexar county is not a "local" or "special" law, in the sense in which these terms are used in the Constitution. Said Act is on a general subject—the regulation of the courts—which cannot be said to affect the welfare and interest of this district alone.'

"In State vs. Corson, 67 N. J. Law, 178, 50 Atl., 780, it is said: 'As to the contention that this Act is a local or special law regulating the internal affairs of counties and granting exclusive privileges to individuals: The Act is said to regulate the internal affairs of counties, because it applies only to the tide waters of Delaware Bay and Maurice River cove, which lie entirely within the counties of Cape May and Cumberland. But, although the area of application is limited to those counties, it clearly does not regulate their internal affairs, for it deals exclusively with property rights of the State, in which every citizen has an interest. That it confers exclusive privileges, however, is apparent. As was said in State vs. Post, 55 N. J. Law, 264 (26 Atl., 683), the right

to plant and cultivate oysters on the lands of the State is a privilege, and, inasmuch as the statute excludes from the enjoyment of that right every one except the lessees of the State and their licensees, the privilege is an exclusive one. But this fact does not deprive the State of power to appropriate all or any part of its lands under water for the encouragement and protection of the planting and cultivating of oysters, and to grant rights therein for that purpose. Its effect is to require such appropriation to be made by general laws, and it prevents the selection of individuals or corporations as the objects of the State's bounty to the exclusion of other citizens of the State. State vs. Post, *supra*. Is the law, then, a special or local law, and does it exclude any of the citizens of the State from participating in the privileges which it confers? A statute is not special or local merely because it authorizes or prohibits the doing of a thing in a certain locality. It is, notwithstanding this fact, a general law, if it applies to all the citizens of the State and deals with a matter of general concern. Doughty vs. Conover, 42 N. J. Law, 193. The application of this principle led this court, in the case cited, to the conclusion that a statutory provision which made it unlawful for any person to net fish during certain periods of the year "in the waters of Burlington and Atlantic" was not special or local, but general. Although it deals with the lands of the State under tide water only in certain localities, the matters which it regulated are of general, not local, concern. The lands themselves belong to the people of the State, not to the citizens of the counties where they are located.' See, also, Holt vs. Mayor and Aldermen of Birmingham, 111 Ala., 369, 19 South., 735; City of Pond Creek vs. Haskell, 21 Okla., 711, 97 Pac., 338; Anderson vs. Ritterbusch, 22 Okla., 761, 98 Pac., 1002.

"If said Act be a special Act, then every Act of the Legislature fixing the salary of the Governor of the State, or the terms of the Supreme Court, or locating or making an appropriation for any particular State institution, would be a special Act, and in order to change the salary of the Governor, or fix the terms of the Supreme Court, or locate or make an appropriation for such State institution, it would be necessary to first publish a notice as required by Section 32 of Article 5, *supra*. This provision of the Constitution should receive a reasonable construction. This notice was required to be published where laws applying solely to partic-

ular individuals, or to any particular locality, were sought to be passed for the benefit or prejudice of such locality, in order that they might have an opportunity to appear before the Legislature and remonstrate against the passage of such law if they did not think it was wise. But when such law applies to every part of the State, locating the capital for the entire State, the very fact that it locates it at a particular spot does not make it a special law." (113 Pac., 948-9.)

We submit the foregoing quotation from the case as presenting an appropriate argument, to the effect that the law now before this court is neither a local nor a special law. As very well said by the Oklahoma court, *"When such a law applies to every part of the State, locating the capital for the entire State, the very fact that it locates it at a particular spot does not make it a special law."*

We may, with equal propriety and with as much reason, say that the mere fact that the law under examination relates to condemnation of lands in Travis and Galveston counties does not make it a local or special law, for the reason that the condemnation of this land for the University of Texas is for the entire State and for all the people of the State.

Having thus shown that the legislative Act before the court is a general law and not a special or a local law, it follows that it does not come within the inhibitions of Section 56, Article 3, of the Constitution of this State and the trial judges did not err in declining to grant the interlocutory injunction on this ground.

COUNTER PROPOSITION UNDER APPELLANTS' THIRD ASSIGNMENT OF ERROR.

The statute attacked in this proceeding, towit: Chapter 6, General Laws passed by the Thirty-third Legislature at its First Called Session in 1911, is a general and not a local or special law and is therefore not within the inhibitions of Section 57, Article 3, of the Constitution of the State of Texas prohibiting the passage of local or special laws unless notice of the intention to apply there-

for shall have been published for thirty days prior to the introduction of the bill in the Legislature; and the court and judges did not err in refusing the interlocutory injunction based upon the ground that such notice was not published as required by said section and article of the State Constitution.

AUTHORITIES.

The same as under our previous counter proposition.

ARGUMENT.

We have just shown by the authorities that this Act of the Legislature is not a local or special one, and it was therefore unnecessary that it be published. The trial judges did not err in declining to grant the interlocutory injunction on the ground that notice of the intention to apply to the Legislature for the passage of this law was not published, as is required by the Constitution in a local or special law when a local or special law is to be passed.

ADDITIONAL COUNTER PROPOSITION UNDER APPELLANTS' THIRD ASSIGNMENT OF ERROR.

Were it conceded, however, that the act in question in this proceeding is a local or special law, notice of which was required to be published thirty days prior to its introduction in the Legislature as set forth in Section 57, Article 3, of the Constitution, still the Legislature having passed the measure its action is conclusive, and the courts cannot inquire as to whether or not the notice required by the Constitution was in fact published.

AUTHORITIES.

Moller vs. City of Galveston, 57 S. W., 1116 (1120).
State vs. Larkin, 90 S. W., 912 (917).
Cravens vs. State, 122 S. W., 29 (31).

ARGUMENT.

The counter proposition states the fundamental rule in this State.

In the case of Moller vs. City of Galveston, 57 S. W., 1116 (1120), decided by the Court of Civil Appeals of this State and against which a writ of error was denied by the Supreme Court of this State, the court had before it a case relative to the charter of the city of Galveston, Texas, in which the contention was made that notice to apply for the special law amending the charter was not published as required by the Constitution of the State. In this particular case there had been some publication which the court held sufficient; however, the court announced the doctrine which is adhered to generally by the courts of this State to the effect that the passage of special or local laws by the Legislature presupposes a compliance with the Constitution by publication of the appropriate notice and prevents an inquiry by the court into the question as to whether or not such publication was in fact made.

Concerning this subject the court in the opinion referred to, in part, said:

"But we are of the opinion that the passage of the Act by the Legislature is conclusive of the fact that due notice was given. The Constitution requires evidence of such publication to be exhibited to the Legislature before such Act shall be passed. This, we think, is for the purpose of authorizing that body to pass conclusively upon this question of fact. To hold otherwise would be to relegate to the courts the ascertainment of a jurisdictional fact for the Legislature, and to unsettle every special or local law that has been passed since the adoption of the Constitution." (57 S. W., 1120.)

In the case of State vs. Larkin, 90 S. W., 912 (917), one of the questions at issue related to an Act of the Legislature validating a city charter. The insistence was made that this special Act was invalid because notice to apply for its passage had not been published as required by the constitutional provision now before the court. The trial judge sustained an exception to this allegation.

Concerning the correctness of the trial court's ruling, the Court

of Civil Appeals in the case referred to and in which case a writ of error was denied by the Supreme Court of the State, said:

"The court sustained an exception to these allegations. In doing so we think the court ruled correctly. We are of the opinion that these matters could not be inquired into by the court for the purpose of invalidating a statute appearing upon its face to have been duly enacted." (90 S. W., 917.)

The opinions quoted on the propositions referred to are cited and approved in the case of Cravens vs. The State, 122 S. W., 29, which is a criminal case and the opinion in which was written by Judge Ramsey, who at that time was on the Court of Criminal Appeals of the State and who afterwards was an Associate Justice of the Supreme Court of the State.

COUNTER PROPOSITION UNDER APPELLANTS' FOURTH AND SIXTH ASSIGNMENTS OF ERROR.

The objection raised by the appellants' fourth and sixth assignments of error is in substance that the Act of the Legislature before the court provides for the payment only of the value of the land after the taking by condemnation proceedings and not for any consequential damages arising by reason of a partial taking of appellants' lands. If it should be conceded that this is a correct construction of the legislative enactment, still appellants are in no position to complain, for the reason that as to them the act is a valid and constitutional one. The record in this case shows that it is the purpose of the Board of Regents of the University to condemn and take the whole of appellants' tract of land; and the law provides that if the whole of appellants' land is condemned and taken the Board of Regents will be compelled to pay them for the whole of the same. Therefore, no constitutional question is raised by the facts in this case, and the court cannot be called upon to pass upon a state of facts which does not exist and may never exist.

STATEMENT.

The appellees did not at any time prior to the filing of this suit intend, nor have they since intended, to take a part only of appellants' land, but at and prior to the filing of the suit, and since, down to the time of the trial, the intention of the appellees has been to take and appropriate the whole of the appellants' land described in the bill. (R., p. 17.)

AUTHORITIES.

Hooker vs. Burr, 194 U. S., 415 (419).
Tyler vs. Judges, etc., 179 U. S., 405.
Turpen vs. Lemon, 187 U. S., 51 (60).
6th Ruling Case Law, Sec. 87, p. 89.
Sweeney vs. Webb, 76 S. W., 766 (770).
Bowman vs. State, 40 S. W., 796.
State vs. Blake, 144 S. W., 1094.
Annotated Cases, 1913-C, p. 1283.
Plumb vs. Christi, 42 L. R. A., 181.
Cooley's "Const. Limitations," 6th Ed., p. 196.

ARGUMENT.

The rule invoked is elementary, and is thus stated in 6th Ruling Case Law, above cited:

"Before a law can be attacked by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement on his rights. One who is not prejudiced by the enforcement of an Act of the Legislature cannot question its constitutionality, or obtain a decision as to its invalidity on the ground that it impairs the rights of others. It has been said that courts cannot pass on the question of the constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the government of a particular case before the court, for the power to revoke or repeal a statute is not judicial in its character." (6th Ruling Case Law, Sec. 87, pp. 89-90.)

Judge Cooley, in his work on "Constitutional Limitations," above cited, has this text on the subject:

"Nor will a court listen to an objection made to the constitutionality of an act by a party whose right it does not affect, and who has, therefore, no interest in defeating it. On this ground it has been held that the objection that a legislative Act was unconstitutional, because divesting the rights of remaindermen against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remaindermen themselves. And a party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision in the Constitution designed for the protection of private property. The statute is assumed to be valid, until someone complains whose rights it invades. *Prima facie,* and upon the face of the act itself, nothing will generally appear to show that the Act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the Legislature, therefore, concurs with well established principles of law in the conclusion that such an Act is not void, but voidable only; and it follows as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the Act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose."

In the case of Hooker vs. Burr, *supra,* the Supreme Court of the United States states the rule as follows:

"We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute as violating any constitutional provision must show that he may be injured by the unconstitutional law before the court will listen to his complaint."

In the case of Tyler vs. Judges, 179 U. S., 405 (408), the Su-

preme Court of the United States, quoting from a brief opinion of the same court, set forth the rule applicable here, as follows:

"As we had occasion to observe in California vs. San Pablo & Tulare Railroad, 149 U. S., 308, 314, 'the duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties, or counsel, whether in the case before the court, or in any other case, can enlarge the power or affect the duty of the court in this regard.' See, also, Lord vs. Veazie, 8 How., 251; Cleveland vs. Chamberlain, 1 Black, 419; Kimball vs. Kimball, 174 U. S., 158." (179 U. S., 408-9.)

These authorities suffice, if, indeed, any were ever required, to recall the general rule, which is applicable here, that one cannot object to the unconstitutionality of a statute unless he has some rights which are infringed by the statute. In the present case the appellants have no rights of this character for the reason that the State seeks to take the whole of their property, and therefore the failure of the statute, if it does so fail, to provide compensation for any collateral injury to remaining property from the taking of a part of the land does not apply to them.

It will be noted that Section 17 of Article 1 of the Constitution of this State reads, in part, as follows:

"No person's property shall be taken, damaged or destroyed for, or applied to public use without adequate compensation being made, unless by the consent of such person, etc."

The provision is threefold in its effect: (1) It declares that no person's property shall be taken; (2) that no person's property shall be damaged or destroyed; and (3) that no person's property shall be applied to public use without adequate compensation. The

present Act of the Legislature clearly provides adequate compensation where the whole of the property is taken or applied to a public use. There could not be, of course, any consequential damages where the whole of the property is taken. Even under the construction evidently insisted upon by appellants, the statute is adequate and valid for the purpose of compensating the appellants where the whole of the property is taken. It may be that the Legislature should have made provision for compensation where property is damaged, or only a part is taken, but none of the appellants' property is to be damaged, but the whole is to be taken. The statute requires ample and complete compensation, in that it provides that the appellants' property may not be taken until its value has been paid to the appellants, or deposited in court subject to their order. The appellants in this case, therefore, are in no position to raise the question that this law, or some other law, should have made provision for consequential damages in cases where the Board of Regents undertakes to condemn only a part of the property of a complaining party.

COUNTER PROPOSITION UNDER APPELLANTS' FIFTH, SIXTH AND SEVENTH ASSIGNMENTS OF ERROR.

These assignments of error read in the light of paragraph 8 of appellants' bill, we take it, mean that appellants' contention is that the Legislature in conferring upon the Board of Regents the right to determine what property shall be condemned and the quantity which shall be taken, delegated judicial authority to the Board of Regents when such authority should have been conferred upon the court. To this we reply that it was primarily within the legislative power to determine that land for the University of Texas for the purposes stated in Section 1 of the legislative Act before the court was necessary, and that such taking was for a public purpose; that the necessity of taking land by condemnation, the identity of the land to be taken and the quantity to be taken, are not judicial questions, but are legislative in their char-

acter and the exercise of which may be delegated or conferred upon the Board of Regents of the University of Texas.

AUTHORITIES.

Cooley's "Constitutional Limitations," 6th Ed., p. 663.

10th Ruling Case Law, Sec. 158, p. 183.

Shoemaker vs. U. S., 147 U. S., 282 (289).

U. S. vs. Gettysburg, etc., Ry. Co., 160 U. S., 668.

Adirondack Ry. Co. vs. New York, 176 U. S., 335 (349).

Pittsburg, etc., Ry. Co. vs. Sanitary Dist. of Chicago, 2 L. R. A. (N. S.), 226 (229).

Crowley vs. St. L., etc., Ry. Co. of Texas, 56 S. W., 615.

So. Ry. Co. vs. Memphis, 41 L. R. A. (N. S.), 828 (834).

10th Ruling Case Law, Sec. 167, p. 195.

Kohl vs. United States, 91 U. S., 367.

Chappell vs. United States, 160 U. S., 499 (510).

Travis Co. vs. Trogden, 88 Texas, 302.

Johnson vs. Galveston Co., 85 S. W., 511.

Click vs. Lamar Co., 79 Texas, 121.

Galveston vs. Brown, 67 S. W., 156.

San Antonio, etc., Ry. Co. vs. Southwestern, etc., Telephone Co., 93 Texas, 313 (322).

Harris vs. Hopson, 5 Texas, 533.

Lindsey vs. Luckett, 20 Texas, 520.

Walker vs. Howard, 30 S. W., 1096.

4 Ency. U. S. Rep., pp. 897, 991.

ARGUMENT.

The authority to determine whether the power of eminent domain should be exercised in any case rests with the State. The question is one of political character, not requiring any hearing upon the facts or any judicial determination. It is purely a matter of the legislative department of the government. This rule has been well stated by Judge Cooley in his work on Constitu-

tional Limitations. Writing with reference to the condemnation of land, he says:

"The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the State itself; and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination. Nevertheless, when a work or improvement of local importance only is contemplated, the need of which must be determined upon a view of the facts which the people of the vicinity may be supposed best to understand, the question of necessity is generally referred to some local tribunal, and it may even be submitted to a jury to decide upon evidence. But parties interested have no constitutional right to be heard upon the question, unless the State Constitution clearly and expressly recognizes and provides for it. On general principles, the final decision rests with the legislative department of the State; and if the question is referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The State is not under any obligation to make provision for a judicial contest upon that question. And where the case is such that it is proper to delegate to individuals or to a corporation the power to appropriate property, it is also competent to delegate the authority to decide upon the necessity for the taking."

In the case of Shoemaker vs. United States, above cited, the Supreme Court of the United States had before it an Act authorizing the condemnation of certain lands for the United States for the establishment of a park. In that case, the Supreme Court, among other things, said:

"The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the Legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; *that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.*" (147 U. S., p. 298.)

In the case of United States vs. Gettysburg, etc., Ry. Co., *supra,*

the Supreme Court of the United States followed its holding in the Shoemaker case, saying:

"The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative and not a judicial question." (160 U. S., 685.)

In the case of Adirondack Ry. Co. vs. New York, above cited, the Supreme Court of the United States said:

"The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the State takes for its own purposes." (176 U. S., 349.)

The Texas case cited (56 S. W., 615) holds to the same effect with reference to the right of a railway company to condemn land for the purpose of widening its tract, citing the case of Boom Company vs. Patterson, 98 U. S., 403.

In 10th Ruling Case Law, Section 158, page 183, the writer of the text on "Eminent Domain" declares that the necessity and utility of any proposed improvement requiring the exercise of this power, the suitableness of the location selected and the necessity of taking the land selected are matters concerning which the courts have no power to interfere, but that these questions are legislative in their character. The text referred to is a brief one, but is supported by a large number of authorities in note 15 in the volume and on the page above named. The text is as follows:

"The Legislature, in providing for the exercise of the power of eminent domain, may directly determine the necessity for appropriating private property for a particular improvement or public use, and it may select the exact location of the improvement. In such a case it is well settled that the utility of the proposed improvement, the extent of the public necessity for its construction, the expediency of constructing it, the suitableness of the location selected and the consequent necessity of taking the land selected for its site, are all questions exclusively for the Legislature to determine, and the courts have no power to interfere, or to sub-

stitute their own views, for these of the representatives of the people." (10 Ruling Case Law, 158.)

The other authorities cited well support the proposition that the necessity of taking land for a public use, the identity and quantity of the land to be taken, and all other questions indirect, collateral and supplementary to these named, are legislative questions over which the courts have no jurisdiction. It therefore cannot be a delegation of judicial authority for the determination of these matters to be delegated to the Board of Regents of the University of Texas, for the reason that they are not judicial questions.

The whole matter has been well stated by the Supreme Court of Tennessee, in the case of So. Ry. Co. vs. Memphis, cited above. This case is a condemnation case, and the questions at issue here were passed upon by the court in language as follows:

"But all other incidents of the taking are political questions, for the determination of the sovereign, and not judicial questions, for the determination of the courts. Selecting the property to be taken, as contradistinguished from similar property in the same locality, determining its suitableness for the use to which it is proposed to put it, as well as deciding the quantity required, are all political questions, which inhere in and constitute the chief value of the power to take. This power would be a vain and empty thing if the owner could contest the advisability of taking his property, rather than his neighbor's, or if he could interpose as a defense to the taking that other property could be found which would suit the public purposes better, or that he, the owner, was of opinion and could prove that the public needed more or less than the quantity proposed to be taken. The power to take would be of small value, if the thing to be taken, in its quantity, quality, and locality, could be determined by another and adverse interest. The authorities seem to be in harmony, some of which are: Anderson vs. Turbeville, 6 Coldw., 150; Shoemaker vs. U. S., 147 U. S., 282, 37 L. Ed., 170, 13 Sup. Ct. Rep., 361; Mississippi & R. River Boom Co. vs. Patterson, 98 U. S., 406, 25 L. Ed., 207; U. S. vs. Gettysburg Electric R. Co., 160 U. S., 668, 40 L. Ed., 576, 16 Sup. Ct. Rep., 427; Kohl vs. U. S., 91 U. S., 367, 23 L. Ed., 449; U. S. vs. Fox, 94 U. S., 320, 24 L. Ed., 192; 10 Am. &

Eng. Ency. of Law, p. 1069; Illinois C. R. Co. vs. Chicago, 141 Ill., 602, 17 L. R. A., 530, 30 B. E., 1044." (41 L. R. A. (N. S.), 834.)

On the other division of the proposition before us, the authorities are equally as conclusive, that is, that the legislative authority which we have just been discussing may be delegated to the Board of Regents of the University.

Cooley's "Constitutional Limitations," 6th Ed., p. 663.

10th Ruling Case Law, Sec. 167, p. 195.

Kohl vs. United States, 91 U. S., 367.

Chappell vs. United States, 160 U. S., 499 (510).

Adirondack Ry. Co. vs. N. Y., 176 U. S., 335 (349).

It is quite elementary that the power of eminent domain not only may be delegated to public officers for the purpose of being exercised on behalf of the State, but it is a power which may be delegated to municipal corporations, private corporations, and others engaged in occupations the purposes and effect of which are public in character.

Travis Co. vs. Trogden, 88 Texas, 302.

Johnson vs. Galveston Co., 85 S. W., 511.

Click vs. Lamar Co., 79 Texas, 121.

Galveston vs. Brown, 67 S. W., 156.

San Antonio, etc., Ry Co. vs. Southwestern, etc., Telephone Co., 93 Texas, 313 (322).

The text writer in the Ruling Case Law sums up the holding in his text as follows:

"Authority to take land by eminent domain rests in the Legislature, which may and occasionally does exercise the power directly, though more frequently duly accredited agencies are employed for this purpose. * * * When property is taken for the State, the taking is frequently made by a commission appointed by the Governor and granted the requisite authority by the Legislature." (10th Ruling Case Law, Sec. 167, p. 195.)

We conclude, therefore, on the whole that the authority con-

ferred upon the Board of Regents in this case is not judicial authority, delegated in violation of the Constitution, but is legislative authority, lawfully delegated to the Board of Regents of the University in a manner consistent with the Constitution and laws of this State and consistent with the holdings of the courts generally throughout the United States.

The tribunal created by the Act of the Legislature before the court is authorized to take cognizance of a condemnation suit only when the land sought to be condemned is deemed by the Board of Regents expedient for sites on which to erect buildings for the use of the University, for extension of its campus and for other purposes necessary in the conduct of the University. Allegations that the land sought to be condemned is for these purposes would be necessary in order to invoke the jurisdiction of the court; and whether or not the land sought to be condemned is to be used for these purposes necessarily becomes a justiciable and issuable fact to be tried by the court if any contest be made of it; but the propriety of erecting buildings on any of the land or extending the campus over it, or the use of the land for any other University purpose would not be an issuable fact before the court, because these are administrative matters confided alone to the Board of Regents of the University. The Legislature by its own Act determined that it was proper that land should be condemned for University purposes, and the necessity for this action on the part of the Legislature, as we have seen, is not a judicial question. We have also seen that the amount of land to be taken and its location are not judicial questions, but properly legislative questions which may be delegated for determination to the Board of Regents of the University. So it appears that the tribunal created by this legislative act, for the purpose of determining the issues defined in the law, has ample authority, and that the hearing thereunder would clearly be due process of law under the Fourteenth Amendment to the Constitution. This tribunal has authority to determine the only issues made necessary. The first issue of course is the court's own jurisdiction and the second and only remaining

issue is the value of the property to be condemned. We take it that it will not be controverted that every court has inherent authority to determine its own jurisdiction and whether or not actions pending before it are brought in good faith for the purposes specified in the pleadings.

AUTHORITIES.

Harris vs. Hopson, 5 Texas, 533.
Lindsey vs. Luckett, 20 Texas, 520.
Walker vs. Howard, 30 S. W., 1096.
4 Ency. U. S. Rep., pp. 897, 991.

COUNTER PROPOSITION UNDER APPELLANTS' EIGHTH AND NINTH ASSIGNMENTS OF ERROR.

The court and judges did not err in refusing to grant the interlocutory injunction on the ground that the Act before the court provided that possession might be taken of lands condemned pending an appeal for the reason that the Act does not so provide; but, on the other hand, awards to appellants all the legal remedies available on appeal to other litigants, including the right of supersedeas; and besides provides for a deposit of money in the court equal to the value of the condemned lands before the entry of the judgment of condemnation; the legal remedies open to appellants under this Act are therefore full, complete and adequate.

STATEMENT.

Section 6 of the legislative Act under review reads as follows:

"When the value of the land has been ascertained in either of the modes above prescribed, and the court is satisfied with such valuation, it shall enter a decree vesting the title in such lands in the State of Texas for the use and benefit of the University of Texas, to be held, owned, possessed and enjoyed by the State of Texas for the purposes hereinbefore recited. No such decree shall be entered until the value of the land so ascertained, together with all reasonable costs and expense of the owner in attending such proceeding, shall be paid to him, or into court for his benefit and

subject to his order, such costs and expenses to be assessed by the court for which any such proceeding is had, including reasonable attorney's fees to be fixed by the court."

Sections 4 and 5 of the same Act declare:

"Provided the parties to said proceeding shall have the right of appeal as in other civil cases."

AUTHORITIES.

Vernon's Sayles' Civil Statutes, Vol. 2, Title 37, Chapter 20, and, particularly, Articles 2097, 2098, 2099, 2101, 2103.

ARGUMENT.

The articles of the statute above specified are copied in the back of this brief under Appendix "E." Provision is made by the Texas statutes for the prosecution of appeals by giving either a cost or a supersedeas bond. Or should a party be unable to give the cost bond, he may make an affidavit of such fact, the filing of which will perfect his appeal. Should he give a supersedeas bond, the execution of the judgment is stayed. Revised Statutes, Article 2101. The statute before the court gives appellants the right of appeal the same as other litigants, and they could appeal either by giving a cost bond or supersedeas bond; and in the event the latter was given the entire judgment would be suspended and execution stayed under Article 2103 until the case is finally determined by the higher courts. We have already quoted Section 6 of the law before the court, and there is nothing in this section authorizing the University authorities to take possession of the land condemned pending appeal by supersedeas. The fact is that the statute is far more favorable to appellants than it was necessary to make it under the Constitution of the State of Texas. Section 17, Article 1, of the State Constitution, reads as follows:

"Eminent Domain; Privileges and Franchise.—No person's property shall be taken, damaged or destroyed for, or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use

of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

It will be noted that this article of the Constitution requires that compensation be paid before the property is taken, but where property is taken for the use of the State this is not necessary. So, as a matter of fact, the statute in the present case goes further in requiring payment before the entry of the judgment than was necessary, because this statute was for the purpose of authorizing the condemnation of property "for the use of the State."

Conclusion.

We respectfully pray that this case be in all things affirmed.

B. F. Looney,
Attorney General.
Brooks, Hart & Woodward,
Attorneys.
C. M. Cureton,
Assistant Attorney General.
Solicitors for Appellees.

APPENDICES.

APPENDIX A.

SECTIONS FROM ARTICLE 7 OF THE CONSTITUTION OF TEXAS.

SEC. 10. *University; land and funds.*—The Legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State, and styled "The University of Texas," for the promotion of literature, and the arts and sciences, including an Agricultural and Mechanical department.

SEC. 11. *Funds; how invested.*—In order to enable the Legislature to perform the duties set forth in the foregoing section, it is hereby declared that all lands and other property heretofore set apart, and appropriated, for the establishment and maintenance of the "University of Texas," together with all the proceeds of sales of the same, heretofore made or hereafter to be made, and all grants, donations and appropriations that may hereafter be made by the State of Texas, or from any other source, shall constitute and become a permanent University fund.

And the same as realized and received into the Treasury of the State (together with such sum, belonging to the fund, as may now be in the Treasury) shall be invested in Bonds of the State of Texas, if the same can be obtained, if not, then in United States Bonds and the interest accruing thereon, shall be subject to appropriation by the Legislature to accomplish the purpose declared in the foregoing section.

Provided, that one-tenth of the alternate sections of the lands granted to railroads, reserved by the State, which were set apart and appropriated, to the establishment of the "University of Texas" by an act of the Legislature of February 11th, 1858, entitled "An Act to establish 'The University of Texas,'" shall not

be included in, or constitute a part of the permanent University fund.

SEC. 12. *Lands to be sold; relief of purchasers.*—The land herein set apart to the University fund shall be sold under such regulations, at such times, and on such terms as may be provided by law; and the Legislature shall provide for the prompt collection, at maturity, of all debts due on account of University lands, heretofore sold, or that may hereafter be sold, and shall in neither event have the power to grant relief to the purchasers.

APPENDIX B.

FROM ARTICLE 16 OF THE CONSTITUTION OF TEXAS.

SEC. 30-a. The Legislature may provide by law that the members of the Board of Regents of the State University and Board of Trustees or Managers, of the educational, eleemosynary, and penal institutions of the State, and such boards as have been, or may hereafter be established by law, may hold their respective offices for the term of six (6) years, one-third of the members of such board to be elected or appointed every two (2) years in such manner as the Legislature may determine; vacancies in such offices to be filled as may be provided by law, and the Legislature shall enact suitable laws to give effect to this section. (Added, and adopted at Election, Nov. 5th, 1912.)

APPENDIX C.

TEXAS STATUTES FIXING THE TERM OF OFFICE OF THE BOARD OF REGENTS.

ART. 4042a. The board of regents of the university of Texas shall be composed of nine persons, who shall be qualified voters; the board of directors of the agricultural and mechanical college of Texas shall be composed of nine persons, who shall be qualified voters; the state board of regents of the normal colleges shall be composed of six persons, who shall be qualified voters; the board

of regents of the college of industrial arts for women shall be composed of six persons, three of whom may be women; the board of managers of the blind institute, the deaf and dumb institute, the deaf, dumb and blind institute for colored youths, the Confederate home, the Confederate woman's home, of each of the insane asylums, the epileptic colony and the orphans home, shall each be composed of six members, who shall be qualified voters.

ART. 4042b. The members of the governing board of each of the state institutions of higher education mentioned in section 1 (Art. 4042a) shall be selected from different portions of the state, and shall be nominated by the governor and appointed by and with the advice and consent of the senate. In event of a vacancy on said board, the governor shall fill said vacancy until the convening of the legislature and the ratification by the senate. The members of each of said boards who shall be in office at the time this Act takes effect shall continue to exercise their duties until the expiration of their respective terms, as shall be determined according to requirements of section 3 of this Act (Art. 4042c) and additional members shall be appointed in the manner prescribed herein to fill out the membership herein provided for.

ART. 4042c. The following members of the several governing boards shall be divided into equal classes, numbered one, two and three, as determined by each board at its first meeting after this Act shall become a law, these classes shall hold their offices two, four and six years, respectively, from the time of their appointment. And one-third of the membership of each board shall hereafter be appointed at each regular session of the legislature to supply the vacancies made by the provisions of this Act and in the manner provided for in section 2 (Art. 4042b), who shall hold their offices for six years, respectively. The duties of the several governing boards shall be determined by law heretofore enacted or that may hereafter be enacted, no changes in the said duties being made by this Act. (Vernon Sayles' Statutes, 1914.)

APPENDIX D.

Various Articles of the Statutes Governing the University of Texas.

Art. 2626. *University funds.*—The following shall constitute a permanent fund for the University of Texas, to be used for the benefit of said university:

1. All lands and other property heretofore set apart and appropriated for the establishment and maintenance of the University of Texas under any previous law.

2. One million acres of the unappropriated public domain of the state set apart for that purpose by the present constitution, and one million acres of land set apart by act of April 10, 1883.

3. All bonds that have heretofore or that may hereafter be purchased with the proceeds of the sale of the university lands.

4. All proceeds of the sales of university lands that are now, or may hereafter be, placed in the treasury of the state.

5. In addition to the foregoing, all grants, donations and appropriations that may be hereafter made, or that may be received from any other source. (Const., art. 5, secs. 10-15. Act Feb. 11, 1858, p. 148. P. D. 3573. See acts 1879, extra session, ch. 18.)

Art. 2627. *Shall be held in trust and invested.*—Such portions of the funds specified in the preceding article as are now in the possession of the state, or that may hereafter be received, shall be held in trust by the state for the use and maintenance of said university; and all such funds as are susceptible of investment, and that have not heretofore been invested, shall be invested for the benefit of such university in the manner provided in the constitution and laws on that subject.

Art. 2628. *Title by donation may be vested, how.*—Any person, association of persons or body corporate making a donation of property for the purposes of establishing or assisting in the establishment of a professorship or scholarship in the university or

any of its branches, either temporarily or permanently, may vest the legal title to the property in any person or persons, body corporate, or the state of Texas, to be held in trust for said purpose, under such directions, limitations and provisions as may be declared in writing in the donation which are not inconsistent with the objects and proper management of said institution or its branches.

ART. 2629. *Donor may direct transmission of title.*—It shall be lawful for the person or persons or body corporate to declare and direct the manner in which said title to said property shall thereafter pass or be transmitted from the person or persons or body corporate receiving it to others in continued succession, to be held and appropriated to the use aforesaid, and it shall be lawful for the donor or donors to declare and direct the person or class of persons who shall receive the benefit of said donation, together with the manner in which the person or persons who shall receive said benefits shall be from time to time selected, as it may become necessary to carry out the objects of the donation; provided, said declarations and directions are not inconsistent with the objects and proper management of said institution or its branches.

ART. 2630. *Shall vest in the state in trust, when.*—In the event there is a failure to transmit the title to the property or to bestow its use in the manner as declared and directed in the donation, or in the event they, or either of them, should become impracticable from the change of circumstances, the title to the property, unless otherwise directed expressly by the donor, shall vest in the state of Texas, to be held in trust to carry into effect the purposes of the donation as nearly as may be practicable by such agencies as may be provided therefor.

ART. 2631. *Must be subject to laws, etc.*—The title to said property donated shall be received, and the trust conferred in the donation shall be assumed, subject to laws that may be passed and carried into effect from time to time which may be necessary

to prevent the loss of, or damage to, the property donated, or an abuse or neglect of the trust so as to defeat, materially change, or prevent the objects of the donation.

ART. 2632. *Copies to be filed with board, etc.*—Copies of said donation shall be procured and filed with the board which may have control of the university or any of its branches to which the donation applies, which board shall report the condition and management of the property and the manner in which the trust is being administered, as part of the matters reported pertaining to said institution.

ART. 2633. *Control of university lands confided to regents.*—The board of regents of the University of Texas are invested with the sole and exclusive management and control of the lands which have heretofore been, or which may hereafter be, set aside and appropriated to, or acquired by, the University of Texas, with the right to sell, lease and otherwise manage, control and use the same in any manner, and at such prices and under such terms and conditions as may to them seem best for the interest of the university, not in conflict with the constitution of this state; provided, that such land shall not be sold at a less price per acre than the same class of land of other funds may be sold at under the statutes.

ART. 2634. *Control of mineral lands confided to regents.*—Said board of regents are invested with the sole and exclusive management and control of all mineral lands within the domain which has been, or may hereafter be, appropriated, set aside or acquired by the University of Texas; and said board of regents are hereby empowered and authorized to sell, lease, manage and control said mineral lands belonging to said university as may seem best to them for the interest of the university; and they are further empowered with authority to explore and have explored and develop said mineral lands and to make any contract with any person whomsoever for the exploration and development of said mineral lands, and pay the expenses for such exploration or development out of the proceeds of the lease or sale of said land.

ART. 2635. *Duty of commissioner of land office.*—The commissioner of the general land office is hereby directed to furnish to the said board of regents complete and accurate maps, and all other data necessary, to show the location and condition of every tract of said university lands, and shall at all times furnish to said board such additional information as they may require, and shall at all times render to said board such assistance as may be possible and as they shall request in the discharge of the duties hereby imposed on said board.

ART. 2636. *Government of university, how vested.*—The government of the university shall be vested in a board of eight regents, selected from different portions of the state, who shall be nominated by the governor and appointed by and with the advice and consent of the senate.

ART. 2637. *Board of regents classified.*—The board of regents shall be divided into classes, numbered one, two, three and four, as heretofore determined by the board, who shall hold their office, two, four, six and eight years, respectively, from the time of their appointment. Two members shall be appointed at each session of the legislature to supply the vacancies made by the provisions of this article, and in the manner provided for in the preceding article, who shall hold their offices for eight years, respectively.

ART. 2638. *Shall have right to use seal.*—The regents and their successors in office shall have the right of making and using a common seal and altering the same at pleasure.

ART. 2639. *How organized.*—The regents shall elect a chairman of the board of regents from their own number, who shall hold his office during the pleasure of the board. They shall establish the departments of a first-class university, determine the offices and professorships, appoint a president, who shall, if they think it advisable, also discharge the duties of a professor, appoint the professors and other officers, fix their respective salaries, and they shall enact such by-laws, rules and regulations as may be necessary, for the successful management and government of the uni-

versity; they shall have power to regulate the course of instruction and prescribe, by and with the advice of the professors, the books and authorities used in the several departments, and to confer such degrees and to grant such diplomas as are usually conferred and granted by universities.

ART. 2640. *May remove officers.*—The regents shall have power to remove any professor, tutor or other officer connected with the institution, when, in their judgment, the interest of the university shall require it.

ART. 2641. *Admission fee limited.*—The fee of admission to the university shall never exceed thirty dollars, and it shall be open to all persons in the state who may wish to avail themselves of its advantages, and to male and female on equal terms, without charge for tuition, under the regulations prescribed by the regents, and all others under such regulations as the board of regents may prescribe.

ART. 2642. *Treasurer.*—The treasurer of the state shall be the treasurer of the university.

ART. 2643. *Available fund.*—The regents shall have authority to expend the interest which has heretofore been accrued, and may hereafter accrue, on the permanent university fund, for the purposes herein specified, and for the maintenance of the branches of the university.

ART. 2644. *Expenditures how made.*—All expenditures may be made by the order of the board of regents, and the same shall be paid, on warrants of the comptroller, based on vouchers approved by the president and countersigned by the secretary.

ART. 2645. *No religious qualifications required for admission.* —No religious qualifications shall be required for admission to any office or privilege in the university; nor shall any course of instruction of a sectarian character be taught therein.

ART. 2646. *Elementary agriculture to be taught.*—The board of regents shall require the teaching of elementary agriculture in

the summer session of the university, as provided in chapter 10 of this title.

ART. 2647. *Shall confer teachers' diplomas, when.*—The university shall also confer teachers' diplomas and certificates in such cases and under such circumstances and conditions as are prescribed in Chapter 14, of this title.

ART. 2648. *Law licenses to issue on diplomas.*—Law licenses shall be granted upon the diplomas of the law department of the university, as prescribed by article 317.

ART. 2649. *Annual report to board of education.*—The board of regents shall report to the board of education annually, and to each regular session of the legislature, the condition of the university, setting forth the receipts and disbursements, the number and salary of the faculty, the number of students, classified in grades and departments, the expenses of each year, itemized, and the proceedings of the board and faculty fully stated.

ART. 2650. *Board of visitors.*—There shall be appointed by the legislature at each regular session a board of visitors, who shall attend the annual examinations of the university and its branches and report to the legislature thereon.

ART. 2651. *Expenses of regents and visitors to be paid.*—The reasonable expenses incurred by the board of regency and visitation in the discharge of their duties shall be paid from the available university fund.

ART. 2652. *Governor to have issued manuscript bonds.*—The governor is authorized and directed to have issued manuscript bonds of the State of Texas to be sold or exchanged at par for the permanent university fund at any time when there is on hand in cash any reasonable amount of such funds not less than five thousand dollars.

ART. 2653. *Character of bonds.*—Said bonds shall be such denomination as the governor may direct, and shall be redeemable at the pleasure of the state, and shall bear interest at the rate of

five per centum per annum, payable at the state treasury on the first day of March of each year.

ART. 2654. *Form of bonds.*—The bonds issued under this chapter shall recite the title and date of passage of the act of 1889, page 81, shall be signed by the governor and treasurer and countersigned by the comptroller, and shall be registered in the office of the state treasurer; and, after said bonds have been registered, the governor shall offer said bonds to the board of education as an investment for the permanent university fund then on hand in cash which are by law authorized to be invested; and, if the board of education take said bonds, the treasurer and comptroller shall make the proper entry, showing the facts of the transaction and the necessary transfer of such funds on their books; and, if the board of education shall not take said bonds thus offered, the same shall be destroyed and canceled and of no effect whatever.

APPENDIX E.

VARIOUS STATUTES RELATING TO APPEALS AND SUPERSEDEAS.

ART. 2097. *Cost bond on appeal or writ of error.*—The appellant or plaintiff in error, as the case may be, shall execute a bond, with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the probable amount of the costs of the suit in the court of civil appeals, supreme court and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and shall pay all the costs which have accrued in the court below, and which may accrue in the court of civil appeals and the supreme court.

ART. 2098. *Appeal, etc., by party unable to give cost bond.*—Where the appellant or plaintiff in error is unable to pay the costs of appeal, or give security therefor, he shall nevertheless be entitled to prosecute his appeal; but, in order to do so, he shall be

required to make strict proof of his inability to pay the costs, or any part thereof. Such proof shall be made before the county judge of the county where such party resides, or before the court trying the case, and shall consist of the affidavit of said party, stating his inability to pay the costs; which affidavit may be contested by any officer of the court or party to the suit, whereupon it shall be the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence and to determine the right of the party, under this article, to his appeal.

ART. 2099. *Appeal or writ of error, perfected, when.*—When the bond, or affidavit in lieu thereof, provided for in the two preceding articles, has been filed and the previous requirements of this chapter have been complied with, the appeal or writ of error, as the case may be, shall be held to be perfected.

ART. 2101. *Supersedeas bond.*—Should the appellant or plaintiff in error, as the case may be, desire to suspend the execution of the judgment, he may do so by giving, instead of the bond or affidavit in lieu thereof mentioned in the four preceding articles, or in addition to such bond, a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to appellee or defendant in error, in a sum at least double the amount of the judgment, interest and costs, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect; and in case the judgment of the supreme court or the court of civil appeals shall be against him, he shall perform its judgment, sentence or decree, and pay all such damages as said court may award against him.

ART. 2103. *Judgment stayed and execution superseded.*—Upon the filing of the bonds mentioned in the two preceding articles, the appeal or writ of error shall be held to be perfected, and the execution of the judgment shall be stayed, and should execution have been issued thereon, the clerk shall forthwith issue a supersedeas.

APPENDIX F.

Authorizing Board of Regents of the University of Texas to Acquire Certain Lands.

An Act to authorize and empower the Board of Regents of the University of Texas to acquire by purchase or condemnation for the use and benefit of the University of Texas such lands within the counties of Travis and Galveston as they may deem expedient for sites on which to erect and maintain buildings and for the extension of the campus and other purposes in the conduct of the said University, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Power and authority is hereby conferred upon the Board of Regents of the University of Texas to acquire by purchase or condemnation for the use and benefit of the University of Texas such lands within the counties of Travis and Galveston as they may deem expedient for sites on which to erect buildings for the use of the said University and for the extension of the campus and for other purposes necessary in the conduct of the said University.

Sec. 2. If the said Board of Regents, in seeking to acquire any lands for any of the purposes aforesaid and the owner or owners of said land cannot agree for the sale and purchase thereof, the Board of Regents shall request the Attorney General to file a petition in the district court of the county in which the land sought to be condemned is situated, describing the land and stating the purpose for which it is desired by the Board of Regents, and praying that the value of such land be ascertained judiciously and a decree be entered vesting title thereto in the State of Texas for the use and benefit of the University of Texas upon the payment of the value so ascertained.

Sec. 3. Upon the filing of any such petition by the Attorney General, the clerk of the court shall issue a citation to the owner or owners of the land as in other civil cases, which citation shall be served and returned as in civil cases, and the cause shall be

COPY BOUND

entered on the civil docket in the name of the Board of Regents of the University of Texas as plaintiff and the owner or owners of the land as defendant.

SEC. 4. At the first term of the court after service of citation upon the owner, as provided in the preceding section, the cause, unless continued on motion thereof, shall be tried by a jury upon a single issue as to the value of the land, and the decision of any such jury shall in all cases be final; provided, the parties to said proceedings shall have the right of appeal as in other civil cases.

SEC. 5. Nothing in the preceding section contained shall be construed to prevent the parties from waiving a jury and submitting to the court the issue as to the value of the land in question, or from selecting by agreement three persons to asccertain the value of such land, under their oaths and the direction of the court; and the finding and decision of the court or of such persons shall in all cases be final; provided, the parties to said proceeding shall have the right of appeal as in civil cases.

SEC. 6. When the value of the land has been ascertained in either of the modes above prescribed, and the court is satisfied with such valuation, it shall enter a decree vesting the title in such lands in the State of Texas for the use and benefit of the University of Texas, to be held, owned, possessed and enjoyed by the State of Texas for the purposes hereinbefore recited. No such decree shall be entered until the value of the land so ascertained, together with all reasonable costs and expenses of the owner in attending such proceeding, shall be paid to him, or into court for his benefit and subject to his order, such costs and expenses to be assessed by the court for which any such proceeding is had, including reasonable attorney's fee to be fixed by court.

SEC. 7. The fact that there is no adequate law authorizing the Board of Regents to acquire such lands as may be needed for the purposes aforesaid, creates an emergency and an imperative public necessity that the rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and this act shall take effect and be in force from and after its passage, and it is so enacted.

CLOSE IN CENTER